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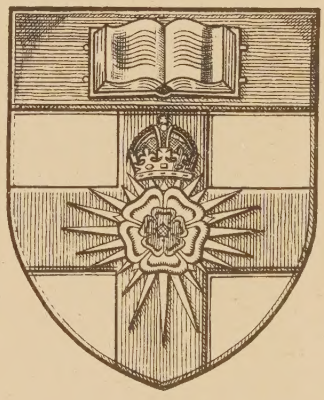

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THE

LAW REPORTS.

English and Irish Appeal Cases

AND

Claims of Peerage

BEFORE

THE HOUSE OF LORDS.

REPORTED BY CHARLES CLARK, ONE OF HER MAJESTY'S COUNSEL,
BY APPOINTMENT OF THE HOUSE OF LORDS.

VOL. VII.

DURING THE SESSIONS OF 1874-5.
XXXVII & XXXVIII AND XXXVIII & XXXIX VICTORIÆ.

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ERRATA.

In the head note to *Peek* v. *Gurney*, the fifth paragraph (Vol. VI. p. 378) begins, "One of the projectors of a company, *a partner of the old firm which sold its business to the company.*" The statement is erroneous in the words printed in italics. He was not a partner. Delete those words.

In *Hilliard* v. *Eiffe* (page 39), the names of the Appellant's Counsel were wrongly given. They were—Mr. *Higgins*, Q.C., Mr. *Edmund Meares Kelly* (of the Irish Bar), and Mr. *J. Mulligan*.

Page 449, *for* "Liverpool" *read* "Appleby."

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Appeal Cases

BEFORE

THE HOUSE OF LORDS.

ENGLISH AND IRISH APPEALS.

THE COMMISSIONERS OF INLAND REVENUE . . . . . } APPELLANTS; 1874 March 26

AND

WILLIAM HARRISON . . . . . RESPONDENT.

Succession Duties Act (16 & 17 *Vict. c.* 51, *s.* 38)—*Allowance on being deprived of an Annuity—Re-settlement made after the Act passed.*

If a tenant for life, and his son, the first tenant in tail under a will or a previous settlement, re-settle the estate, and by such re-settlement an annuity, charged upon the estate, is given to the son during his father's life, and the father dies and the son succeeds to the estate on which the annuity is charged, there must be, in calculating the succession duty under the 38th section of the *Succession Duties Act*, an allowance made to the son in respect of the amount of the annuity.

Whether the re-settlement was made before or after the *Succession Duties Act* came into operation makes no difference.

The cases of *Lord Braybrooke* v. *The Attorney-General* (1), and *The Attorney-General* v. *Floyer* (2) followed, and, upon the points on which they were decided, declared to be undistinguishable.

THIS was an appeal against a decision of the Court of Exchequer Chamber, which had affirmed a previous decision of the Court of Exchequer upon a case stated by the parties under the 28 & 29 Vict. c. 104, s. 59 (the *Crown Suits Act*).

On the 4th of March, 1812, *John Harrison*, of *Whitehaven*, in the county of *Cumberland*, made his will, by which he devised

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certain freehold messuages to the use of his nephew, *John Falcon*, for life, with remainder to the use of *Falcon's* first and every other son in tail. The testator died on the 13th of June, 1844, and *John Falcon* (who then assumed the name of *Harrison*) entered into possession. His first son died unmarried, and without having done any act to affect the entail. In April, 1862, the second son, *William Harrison*, who by the death of his brother had become the first tenant in tail, joined with his father in executing a disentailing deed, and conveyed the devised estates to *Edmund Saulez* and his heirs, to such uses as *John Falcon Harrison* (the testator's nephew, and tenant for life), and *William Harrison* (the Respondent) should appoint, and, in default of appointment, to the use of *John F. Harrison* for life, and after his death to the use of the Respondent in fee.

On the 28th of October, 1863, by an indenture between *John F. Harrison* of the first part, *William Harrison* of the second part, and *Saulez* and another of the third part, *John F. Harrison* and the Respondent conveyed the hereditaments comprised in the previous deed to the use that the Respondent might, during the joint lives of himself and his father, receive out of the rents and profits a clear yearly rent-charge of £240, and, in the event of his marrying during the lifetime of his father, an additional rent-charge of £160, in the whole £400 a year, during his father's life, and subject thereto to the use of *John F. Harrison*, the father, for life, and after his decease to the use of *William Harrison*, the Respondent, for life; and after his decease to such of his issue as *John F. Harrison* and *William Harrison* should jointly appoint, and in default of such appointment to *William Harrison's* issue in tail, and, in default, to other uses, with an ultimate remainder to the use of the Respondent, his heirs and assigns, for ever.

On the 10th of January, 1866, and in the lifetime of his father, the Respondent married, and thereupon became entitled to and received the £400 a year.

On the 23rd of July, 1866, *John F. Harrison*, the father, died, the rent-charge of £400 a year thereupon ceased, and the Respondent entered into possession of the estate.

The Respondent gave the usual notice to the Commissioners of Inland Revenue, and claimed that, in assessing the duty on his

succession, an allowance of £385 should be made in respect of the value of the rent-charge of £400 a year which had ceased. The Commissioners refused to make this allowance, and assessed the duty on the value of the whole estate. It was admitted that, if the Respondent was entitled to the allowance, the sum of £385 was the proper sum to be allowed in respect of the rent-charge.

William Harrison appealed against the assessment to the Court of Exchequer; and in January, 1872, judgment was given in his favour, the Court being of opinion that the allowance claimed ought to be made. This decision was on appeal affirmed by the Exchequer Chamber, which governed itself entirely by the cases of *Lord Braybrooke* v. *The Attorney-General* (1), and *The Attorney-General* v. *Floyer* (2).

This appeal was then brought.

The Attorney-General (Sir *J. Karslake*), and *The Solicitor-General* (Sir *R. Baggallay*), for the Appellants:—

The question really to be determined in this case is whether one portion of the decision in *Lord Braybrooke* v. *The Attorney-General* (1) is to be applied here. There a re-settlement of the estates took place, and an annuity was settled upon the tenant in tail during the life of the tenant for life, and upon the death of the tenant for life and the concurrent ceasing of the annuity, the person who had been tenant in tail became tenant in possession of the estates. The main question there was as to the amount of duty payable after the re-settlement, but there was also a question whether the tenant for life was entitled to an allowance in respect of the annuity, which ceased when he entered into possession of the estates. The first question is immaterial here. The second is the only one now sought to be presented for the consideration of the House. Upon that question it was there held that, under the 38th section of the 16 & 17 Vict. c. 51, the *Succession Duties Act*, the tenant in tail, on succeeding to the estates, was entitled to an allowance in respect of the annuity, of which he was treated as having been "deprived." But that decision may be accounted for by one important circumstance. The re-settlement which created the annuity was executed before the passing

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of the Act. That is a clear ground of distinction between that case and the present. Before the *Succession Duties Act* came into operation the re-settlement was made, and no duty attached upon it. It might well be, therefore, that the after creation of the duty might not affect the dealing with such an estate. But it was otherwise here. It is true that, in *The Attorney-General* v. *Floyer* (1), the re-settlement was made after the Act came into operation, and if that case is to be taken as deciding the question here raised there is an end of the argument. But it is submitted that that case is not to be treated as a binding and conclusive authority here, for the distinction as to the time when the deed of re-settlement was executed does not appear to have been made the subject of serious argument. The two cases were treated as alike upon the point as to the interest out of which the re-settlement was made, which decided the question as to the amount of duty, and it was taken for granted that, as to the allowance in respect of the annuity, the earlier governed the later case. *Floyer's Case* was not therefore a distinct decision upon the point, and not being so, need not now be treated as a binding authority, but the question may still be considered as open for argument.

Supposing that to be so, then the argument against making the allowance in respect of the annuity is strong. The will of 1842 here conferred a succession, and when that succession had taken effect and *Falcon* was in possession, his subsequent dealing, in 1863, with the estate came under the *Succession Duty Act*, and the duty at once attached upon it. Nothing that the father and son, tenant for life and tenant in tail under that will, could afterwards do, could be done without that liability to duty. The estate in the hands even of an alienee would have been liable to the duty. Here there was no relinquishment, or deprivation, of property; there was an acceleration in the enjoyment of a part of it under the 15th section, or there was a disposition made by the successor himself, which would bring the case within the 12th section, but there was nothing whatever which could properly be described as a relinquishment or a deprivation of property within the meaning of the 38th section. The application of that section must be confined to cases where other property was given up, and cannot be

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extended to cases where a part of the same property is enjoyed by an anticipation, and the rest afterwards falls into the possession of the same person. The case of *In re Micklethwait* (1) is no authority for this decision, for there an annuity was payable by a third person on a personal covenant, and the covenant to pay was absolutely to determine if the petitioner should succeed to certain estates. He did so succeed, and he was held thereby to be deprived of the annuity. It might fairly be argued there that it was other property of which the annuitant was "deprived." Here, however, that could not be said: it was part of the same property, to the whole of which the Respondent was to succeed, that part which had been dealt with by him, for his own benefit, before the time arrived for his coming into possession of the rest. It was a mere case of acceleration of an intended succession; and when he came into possession of the whole estate, the enjoyment of part of which he had had by acceleration, it could not be said that he relinquished or was deprived of anything. No allowance therefore ought to be made.

Mr. *Garth*, Q.C., and Mr. *A. L. Smith*, for the Respondent:—

The question raised here has been decided, and cannot be re-opened. There is nothing to distinguish this case from those of *Lord Braybrooke* v. *The Attorney-General* (2) and *The Attorney-General* v. *Floyer* (3). The principle of construction was laid down in the former case, and in the latter, the facts of which are the same as here, it was deliberately adopted. The difference between the *Braybrooke Case* and the *Floyer Case*, namely, that in the latter the deeds of re-settlement were executed after the statute came into operation, was plainly brought to the attention of the House, and was treated as making no difference in the law. The only ground for now raising the question appears to be a passage in Mr. *Hanson's* book on Probate, Legacy, and Succession Duties (4), where, after referring to *Micklethwait's Case* and *Lord Braybrooke's Case*, he observes that "The case is very different with regard to a similar annuity created after the commencement of the Act, and consequently after the charge of duty has attached to the

(1) 11 Ex. 452.
(2) 9 H. L. C. 150.
(3) 9 H. L. C. 477.
(4) Page 279, 280, 4th.

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whole of the expectant successor's interest in the estate. If, for instance, a tenant for life and a remainderman in tail were at any time after the 19th of May, 1853, to join in disentailing the estate, and limiting an immediate life annuity out of it to the latter, this would amount to an acceleration *pro tanto* of his expectant reversionary interest, the duty on account of which would, therefore, under the provision contained in the latter part of sect. 15, be payable in like manner as if no such acceleration had taken place." But all this was fully considered in the *Braybrooke Case* and the *Floyer Case*, and the difference in the single matter of fact in the two was well known to the House, and was disregarded by the House. If it had been thought that in the *Floyer Case* the House might be induced to adopt this construction of the 15th section, the argument on the difference of fact ought to have been pressed in that case; but it was not done, although the author of these observations was himself Counsel in both the *Braybrooke* and the *Floyer Cases*. The decision of the House, as the observations of the noble and learned Lords and the form of the Order shewed, had been given on the very matter now sought to be brought into dispute. It could not, therefore, be now re-opened. The decisions already given were of binding authority, as are all the decisions of this House. That had been held with respect to a decision of this House in *Reg.* v. *Millis* (1), where the noble and learned Lords had been equally divided, as the Judges had been in the Court below, where the result was owing to the form in which the question had been presented to the House, and where Lord *Campbell* had so much disagreed from that result that he actually entered on the Journals his protest against it. Yet, on all subsequent occasions, that impugned decision had been declared by Lord *Campbell* himself, and had been held by the House, to be binding: *The Attorney-General* v. *The Dean and Canons of Windsor* (2); *Beamish* v. *Beamish* (3). There was no such division of opinion in the cases of *Lord Braybrooke* v. *The Attorney-General* (4) and *The Attorney-General* v. *Floyer* (5), though, if there had been, the binding authority of the decision would have been the same.

(1) 10 Cl. & F. 534.
(2) 8 H. L. C. 369.
(3) 9 H. L. C. 274.
(4) Ibid. 150.
(5) 9 H. L. C. 477.

The *Solicitor-General*, in reply, did not ask the House to overrule what it had once deliberately decided, but he submitted here that the question of allowance for the annuity had not, under circumstances such as existed here, been decided, but had, in *Floyer's Case*, been taken for granted, and therefore might now be reconsidered.

THE LORD CHANCELLOR (Lord *Cairns*):—

My Lords, I cannot think that your Lordships will find yourselves at liberty on this occasion to enter into the question of what is the proper construction of the 38th section of the *Succession Duty Act* as if it were a question uncovered by authority which has now become conclusive. And, therefore, my Lords, I think it better to abstain, in the few words which I have to address to your Lordships, from any expression of my own opinion as to whether the decisions which have been already come to upon the meaning and effect of that section are satisfactory or unsatisfactory.

My Lords, what I find to have taken place is this: In the case of *Lord Braybooke* v. *The Attorney-General* (1), a contest was distinctly raised whether, when a father and son, tenant for life and tenant in tail of the property, open the entail, and, reserving a joint power of appointment over the estate, settle, by means of that power, an annuity upon the son for the joint lives of himself and the father, and the father afterwards dies, the son being alive, the value of that annuity is to be taken and allowed as a deduction, under the 38th section, from the value of the succession upon which duty is to be paid. That point was deliberately argued in that case; and in the speeches which were addressed to this House by the noble and learned Lords who were then present the subject was entered into, and their opinions were expressed, and unanimously expressed, in favour and in support of the decision, which was embodied in the Order of the House. The Order upon the face of it refers, not by an express reference, but by the use of words which leave no doubt as to what was meant, to the 38th section, and in fact repeats the very words of the 38th section.

My Lords, it is perfectly true that, in the case of Lord *Braybrooke*, the deeds, to which I have referred as having been executed

(1) 9 H. L. C. 150.

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between the father and the son, were executed before the *Succession Duty Act* came into operation. But the *ratio decidendi* of your Lordships was not founded upon that consideration—it was founded upon the provisions of the 38th section, and if the decision had proceeded upon the fact that the deeds had been executed before the Act came into operation, all reference to the provisions of the 38th section would have been immaterial, and would in fact have been irrelevant.

In the case of *The Attorney-General* v. *Floyer* (1), which subsequently came before this House, it is true that the deeds which were executed between the father and the son, and under which an annuity was secured to the son on the joint lives of himself and his father, were executed after the Act came into operation; and it is possible that an argument might have been addressed to your Lordships urging that that circumstance created a difference between the two cases, and calling upon your Lordships to deal with the case of *Floyer* upon that distinction. No such argument was addressed to your Lordships. The case of *Floyer* upon this point, namely, upon the point whether an allowance was to be made, or was not to be made, with respect to the annuity, was treated as governed by the case of *Braybrooke;* and, in my opinion, it was governed by the case of *Braybrooke.* In my opinion, if the case of *Floyer* had been decided otherwise than in the manner in which it was decided by this House, it would have been inconsistent with the order which this House had made in the case of *Braybrooke.*

Your Lordships are now asked, in the face of those two cases, consistent with each other, and both proceeding upon a certain construction of the 38th section of the *Succession Duty Act,* to arrive at a decision which would be antagonistic to the decision of those cases, and which would put upon the 38th section a construction different from the construction which this House assigned to that section in those two decisions. Now, my Lords, I think that a course of proceeding of that kind is one which your Lordships never have adopted. It appears to me that it would be a most dangerous course for this House to adopt; and if it could be more dangerous in one case than in another, it would be so in a case in which your Lordships are dealing with one of the fiscal

(1) 9 H. L. C. 477.

Acts of the country, as to which the object must be, above that of all other Acts, to maintain them and to expound them in a manner which will be consistent, and which will enable the subjects of this country to know what exactly is the amount of charge and burden which they are to sustain. I think that with regard to statutes of that kind, above all others, it is desirable, not so much that the principle of the decision should be capable at all times of justification, as that the law should be settled, and should, when once settled, be maintained without any danger of vacillation or uncertainty.

I, therefore, advise your Lordships in this case, without entering into the merits of it, which have been argued at the Bar, to declare that the judgment of the Court below should be affirmed, and the appeal dismissed.

LORD CHELMSFORD:—

My Lords, I consider the case of *Lord Braybrooke* v. *The Attorney-General* (1) as a binding authority applicable to the present case, and I am, therefore, of opinion that the judgment of the Court of Exchequer Chamber ought to be affirmed.

LORD HATHERLEY:—

My Lords, I concur in that view, and entirely for the same reason.

LORD SELBORNE:—

My Lords, if it had really turned out that *Floyer's Case* had proceeded upon an application of *Lord Braybrooke's Case* which, when examined, was found to depend upon some erroneous assumption of fact not called to your Lordships' attention during the argument at the Bar, it might have deserved consideration whether or not that was an impediment to your Lordships dealing with a subsequent case according to a sound appreciation both of the facts and of the law, as your Lordships in the well-known instance of *Bright* v. *Hutton* (2) felt yourselves at liberty to do, where even the Judges were unable to discover any sound distinc-

(1) 9 H. L. C. 150: 7 Jur. N.S. 741 (2) 3 H. L. C. 341.

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tion between that and a former case, *Hutton* v. *Upfill* (1), decided the contrary way by your Lordships' House. But the course of the argument has shewn that no such state of circumstances exists in the present case. The argument has really been directed to a totally different purpose, namely, that of shewing that *Lord Braybrooke's Case*, which was decided by your Lordships' House upon one ground, might have been supported, and ought to have been decided upon a different ground. *Lord Braybrooke's Case* ruling the present case on the ground upon which it was actually decided, but, as it is said, not ruling it if it had been decided upon the other ground now suggested, namely, the alleged acceleration of interest, and not the loss or deprivation of property enjoyed under the 38th section of the *Succession Duty Act*. Now that, I apprehend, is an inquiry into which the House cannot possibly enter, because the ground upon which *Lord Braybrooke's Case* was decided is a part of the decision and judgment itself of the House; and that being so, I think that there is really no distinction whatever between the present case and *Lord Braybrooke's*, or between *Floyer's Case* and Lord *Braybrooke's*, arising out of the fact that the re-settlement in *Lord Braybrooke's Case* was, prior to the passing of the *Succession Duty Act*, and in *Floyer's Case*, and in the present case, was subsequent to it. That, in my judgment, is a wholly immaterial distinction with reference to a case depending upon the 38th section. In *Lord Braybrooke's Case*, as well as in the present, the succession of the son was taxed, and was subject to duty under the Act—in each case the father's life interest was not subject to duty—and in that respect the priority or the posteriority of the re-settlement to the passing of the Act was wholly immaterial. The doctrine of *Lord Braybrooke's Case*, upon the principal point decided in it, was, that when a resettlement takes place by father and son, who by the former settlement are tenants for life and in tail in succession to each other, the deed operating by virtue of a joint power, the interests under the re-settlement will be treated, for the purpose of the *Succession Duty Act*, as identical with those out of which they are in substance carved, and that what the son takes by the re-settlement, though by the exercise of a joint power, is to be treated as derived from

(1) 2 H. L. C. 674.

himself, if in point of substance the interest coincides with or falls within that which he would have previously taken. Applying this view to the facts of the case, your Lordships decided that the estate to which the son succeeded on his father's death was derived out of his own former estate tail; and that the annuity of which he was in the enjoyment during his father's life was derived out of his father's former life estate. That being so, it is manifest that in the present case, in substance, the annuity (as it did in *Lord Braybrooke's Case*) comes out of the father's life interest, which was never the subject of succession duty; and the son's succession comes in substance out of his own former estate tail, which is the subject of succession duty. Under those circumstances it really can make no difference whatever with regard to the nature of the annuity whether the instrument creating it was executed before or after the passing of the Act.

Judgment of the Court of Exchequer Chamber affirmed, with costs.

Lords' Journals, 26th March, 1874.

Solicitor for the Appellant: *Solicitor of Inland Revenue.*
Solicitors for the Respondent: *Meynell & Pemberton.*

1874
April 20.

THE DIRECTORS, &c. OF THE NORTH EASTERN RAILWAY COMPANY . . } APPELLANTS;

AND

ROBERT WILLIAM WANLESS . . . . RESPONDENT.

Railway—Level Crossings—Negligence.

Post 242.

Where a railway crosses a public highway on the level, and there are (under the 8 Vict. c. 20, s. 47) gates for the protection of "horses, cattle, carts, or carriages," passing along the highway, it is the duty of the railway company's servants to keep them closed when any train is approaching. If this duty is not performed, and a passenger along the highway is, in attempting to cross the line of railway, injured, the leaving of the gates open is, in an action brought by him, evidence of negligence to go to the jury. It is so, even though, with care and circumspection, he might have been able to see, at a distance, the approach of the train which occasioned the injury.

Per THE LORD CHANCELLOR (Lord *Cairns*):—The gates of the railway, at a place where it crossed the highway at a level, being open, amounted to a statement, and a notice to the public, that the line, at that time, was safe for crossing. (See *Bridges* v. *The North London Railway Company*, *post*.)

THIS was an appeal pursuant to the *Common Law Procedure Act*, 1854, against a decision of the Court of Exchequer Chamber, which had confirmed a previous decision of the Court of Queen's Bench discharging a rule for a new trial (1). The action was brought by the Plaintiff for compensation in damages for an injury inflicted on him through the negligence of the company's servants. The declaration was in the usual form. The first count alleged that the Defendants, by their servants, so negligently and unskilfully managed an engine and carriages on a certain railway while the Plaintiff was then lawfully crossing, that he was injured. The second count described the Defendants as a railway company subject to the provisions contained in the *Railways Clauses Consolidation Act* as to level crossings; that the Defendants' railway crossed a certain highway on a level; that the highway and crossing were protected by gates subject to the control of the Defendants; yet that they were guilty of negligence in running a train across the highway and crossing, and in not providing for the safety of persons using the said level crossing, whereby the Plaintiff who was then

(1) Law Rep. 6 Q. B. 481.

lawfully using the said highway and crossing by the invitation of the Defendants, was injured, &c. The Defendants pleaded not guilty; that the servants were not the servants of the Defendants; and that the Plaintiff was not crossing by the invitation of the Defendants.

The cause was tried before Mr. Justice *Brett*, at *Durham*, in the spring of 1869, when it appeared that on the *Pensher* branch of the *North Eastern Railway*, there was, near *Hylton*, a spot at which the railway crossed a public highway on the level. There were the proper carriage gates, and there was also on each side of the railway a gate for foot passengers. The south side of the railway is called the up-line, the north, the down line. The number of coal trucks daily passing there is very considerable. On the 27th of April, 1868, the Plaintiff, in company with three other boys, came along the road on the north side of the railway to cross over the line by the level crossing. The evidence as to how the boys got on the line, whether through the carriage or the foot-passenger gate, was contradictory. A train of forty-eight empty coal-trucks, was coming on the up, or south side of the line, from *Sunderland* to *Pensher*, and it passed through the *Hylton* station without stopping. The boys had with them a dog, and persons who were on the north, or down side of the line, shouted to the boys to keep the dog from running among the trucks. This train passed, and when it had done so the Plaintiff advanced to cross the line, and was instantly knocked down by a train passing on the north, or down side, of the line, the side on which the boys had been standing. For the company, evidence was given that the Plaintiff might have seen this train at the distance of half a mile; but on the part of the Plaintiff it was stated that the distance between the carriage-gate on the north side and the line itself, is about twelve feet, and that the boys could not on that side see the approaching train till they were seven or eight feet within the gate on the north side. The rules and regulations of the company on this subject were put in evidence. Rule 174 was in these terms: "Unless a written order to the contrary be given by the engineer, the gates shall be kept shut across the carriage roads except when required to be opened to allow the railway to be crossed." Rule 175: "When the railway is required to be crossed, the gatekeeper shall, before opening the gates, satisfy himself that no engine is in sight, he shall then shew his danger signals, and keep them

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exhibited until the line is clear, when he shall close the gates and alter the signals." It did not appear that any signal was exhibited; and on the question whether the carriage-gate on the north side was or was not open, the evidence was contradictory.

It was contended for the company that there was no evidence of negligence to go to the jury. The learned Judge, however, held that there was, and left the case to the jury, who found a verdict for the Plaintiff, damages, £100. Leave was reserved to the Defendants to move. A rule was accordingly obtained to enter a nonsuit on the ground that there was no evidence of negligence, or to have a new trial on the ground that the verdict was against the weight of the evidence. This rule was discharged; and on appeal to the Exchequer Chamber that decision was affirmed. This appeal was then brought.

Mr. *Manisty*, Q.C., and Mr. *Kemplay*, Q.C., for the Company :—

There is nothing here to shew that there was any want of reasonable care on the part of the company's servants. The mischief arose from the negligence of the boy himself. He received no invitation to come on the line; the gates were closed, and no one could exactly say how he got on the line. The duty cast upon the company by the statute, and by the rules framed in consequence of it, refer only to the passing of animals, cattle, carts, and carriages. Foot-passengers are not mentioned in the section; they can always provide for their own safety if they will use reasonable care. The Plaintiff here might have done so. He was warned about the danger to his dog; he knew, therefore, that caution was necessary; he did not act with reasonable caution; he stayed till one train had passed by, and then, without taking any trouble to look whether another was coming, which he might have seen if he had looked, he advanced on the line and was injured. That injury was altogether the result of his own negligence, and there was no evidence to go to the jury that the company's servants had been guilty of any negligence at all. Even if the gates had been left open, that did not constitute an invitation to the Plaintiff to come on the line; and there was no evidence to shew how he came there, or that he came through the carriage-gates at all; and it was those gates that were the special subject of provision in the section of the statute.

Mr. *Charles Russell*, Q.C., Mr. *R. G. Williams*, Q.C., and Mr *W. Lewers*, for the Respondent in the appeal, were not called on.

THE LORD CHANCELLOR (Lord *Cairns*):—

My Lords, the very able counsel who has opened this appeal before your Lordships is one from whom your Lordships are always in the habit of hearing everything which can fairly and properly be urged in support of any case in which he appears as advocate; but it is not within the power of learned counsel to present a case with a stress which the case itself does not possess; and I myself am not surprised that he has found it impossible to urge this case more strongly than he has been able to do. In point of fact, my Lords, I must express my surprise at the Appellants here, finding it to be for their interest, or thinking it desirable, in any way, to bring this case before your Lordships' consideration. The stake involved in the case itself is very small—probably of no importance as compared with the costs of the litigation. As regards the general effect of the bearing of your Lordships' decision upon the conduct of railway companies in future, I cannot conceive that the effect of the decision can be otherwise than wholesome; for it can only lead, as has been remarked in the course of the argument, to their properly performing the duty which the law has already cast upon them, namely, keeping closed the gates of the railway at level crossings at those times at which it would be dangerous to allow the public to cross the line.

The only question raised in the case for your Lordships' determination is, whether there was here evidence of negligence to go to the jury? What the jurors should do upon the evidence, or whether they should find any damages or not, was a question for the jury, and is not for this House now to consider.

My Lords, the facts of the case have been stated so recently, that I do not think it necessary to repeat them. It appears to me that the circumstance that the gates at this level crossing were open at this particular time, amounted to a statement, and a notice to the public, that the line at that time was safe for crossing, and that any person who, under those circumstances, went inside the gates, with the view of crossing the line, might very well have been supposed by a jury to have been influenced by the circumstance that the gates were open. Then, when inside the gates,

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the boy who in this case was injured, saw what was inconsistent with the gates being open, namely, he saw one train passing, and it may very possibly be the case that that circumstance embarrassed him, and that his eyes and attention being fixed upon that particular train, when it passed out of the way he failed to see the other train. He appears not to have seen it, but attempted to cross the line, and was knocked down and injured. It is quite clear he might have seen the other train—there is no doubt about that—but the result of the state of facts only comes to this, that being brought upon the line through the circumstance of the gate being open, he was placed in a position which was more or less embarrassing, and he did not use his faculties so clearly as he might have done under other circumstances.

My Lords, the question is, might not a jury fairly consider that his being there at all was owing to the negligence of the railway company? It appears to me that there was evidence to go to the jury to which weight might have been given, and from which the jurors might have been led to conclude that he was there in consequence of the circumstance I have referred to, viz., the gates being open; and that being the only point for the Court to consider, I certainly am of opinion that the Court could not do otherwise than hold that the question of negligence might upon this evidence rightfully be submitted to the consideration of the jury.

I therefore move your Lordships that the judgment of the Exchequer Chamber and of the primary Court be affirmed, and that this appeal be dismissed with costs.

LORD CHELMSFORD and LORD SELBORNE concurred.

Judgment of the Court of Exchequer Chamber affirmed, and appeal dismissed with costs.

Lords' Journals, 20th April, 1874.

Attorneys for the Appellants: *Williamson, Hill, & Co.*
Attorneys for the Respondent: *John Scott.*

THOMAS LAKEMAN . . . . . APPELLANT;

AND

J. P. MOUNTSTEPHEN . . . . . RESPONDENT.

1874
May 5.

Promise to pay—Statute of Frauds.

A board of health had been formed in a town. *L.* was its chairman. *M.*, a contractor, had, under the orders of the board, formed a main sewer in the town, and, under the orders of the board, had purchased pipes which would be required to be used in making the connecting drains between certain private houses and the main sewer. The board had, under the 11 & 12 Vict. c. 63, s. 69, given notice to the inhabitants of certain streets to make these connecting drains, the effect of the notice being that if the said inhabitants did not make those connecting drains the board might make them and charge the expenses on the defaulting inhabitants. The notice was disregarded. No subsequent resolution was passed by the board. *M.* was about to take away his carts and working materials, when *L.* said to him, "What objection have you to making the connections?" to which *M.* answered, "None, if you or the board will order the work, or become responsible for the payment;" and *L.* replied, "*M.*, go on and do the work, and I will see you paid." *M.* did the work, and, the board refusing to pay, sued *L.* for the amount:—

Held, that the words of *L.* were properly left to the jury as evidence to sustain a claim against him personally, and that they did not constitute a promise to pay the debt of another, so as to come within the operation of the *Statute of Frauds*.

Per LORD SELBORNE:—There can be no suretyship unless there be a principal debtor, existing at the time, or constituted by matters *ex post facto*.

THIS was an appeal against a judgment by the Court of Exchequer Chamber, which had reversed a previous judgment of the Court of Queen's Bench. The case has already been fully reported in the Courts below (1). The following is a summary of the facts: *Lakeman* was the chairman of the Board of Health of the town of *Brixham*. *Mountstephen* was a builder and contractor at *Torquay*, and had often executed works for the board. He had in the early part of 1866 completed for the board a main sewer for the town, and the board had directed him to make a purchase of pipes, and had given notice under the 11 & 12 Vict. c. 63, s. 69 (the *Public Health Act* of 1848) to the owners of certain houses

(1) Law Rep. 5 Q. B. 613; Ibid. 7 Q. B. 196.

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near this main sewer to connect the drains of their houses with it, or that the board would make the connections at their expense. These persons had not obeyed the notice, and the board therefore possessed the power to make the connections and to charge the inhabitants, to whom notice had thus been given, with the cost thereof. The board, however, had not passed any resolution so to do. *Adams*, the surveyor of the board, had proposed to *Mountstephen* to construct these connections. The latter did not do so, as he had no orders from the board. On the 5th of April, 1866 (which was before the expiration of the notice given to the householders), according to *Mountstephen's* evidence, he, after finishing the main sewer, was about to take away his carts and building materials, when, after some talk with *Adams*, a conversation ensued between him and *Lakeman*. The latter said, "What objection have you to making the connections?" *Mountstephen* answered, "None, if you or the board will order the work or become responsible for the payment," to which *Lakeman* replied, "Go on, *Mountstephen*, and do the work, and I will see you paid." *Mountstephen* did the work, but the board, alleging that no orders had been given for the work, declined to pay for it. *Mountstephen* then brought an action against *Lakeman* for the amount due for the work.

The declaration contained three counts. The first stated that the Defendant was the chairman of the board, and that in consideration that the Plaintiff would do and provide certain work and materials for the board at the request of the Defendant, as and assuming to be agent for the board, the Defendant promised the Plaintiff that he was authorized by the board to make the request; that the Plaintiff, relying on the Defendant's promise, did the work; breach, that the Defendant was not so authorized.

The second count stated that the Defendant, being such chairman, in consideration that the Plaintiff would do and provide work and materials for the board, at the request of the Defendant, the Defendant promised to obtain for the Plaintiff from the board a contract whereby the board should be legally bound: breach, that the Defendant did not obtain such contract. The third count was for work and materials done and supplied by the Plaintiff to the Defendant at his request.

The Defendant pleaded, 1, to the first and second counts, that

the Defendants did not promise as alleged; 2, that the Plaintiff did not do the work for the board at the Defendant's request; and 3, never indebted.

The cause was tried before Lord Chief Baron *Kelly* at the *Devon* Summer Assizes, 1870, when, by the permission of the learned Judge, a count was added alleging that the Defendant promised that in consideration that the Plaintiff would do the work for the board, the Defendant promised to pay for the work if the board should at any time refuse to pay.

At the close of the Plaintiff's case the Defendant's counsel submitted that, on the declaration and the evidence (as it then stood), there must be a nonsuit. The learned Judge declined to nonsuit, being of opinion that there was evidence to go to the jury, and he gave leave to the Plaintiff to add the count as above stated. The Defendant's case was then entered on, when the statement of the conversation, as detailed in Plaintiff's evidence, was denied. At the close of the case the Lord Chief Baron left it to the jury to say whether the conversation, as deposed to by the Plaintiff, but denied by the Defendant, had taken place. The jury returned a verdict for the Plaintiff for £287, and leave was then reserved to the Defendant to move to set aside this verdict and enter a nonsuit, if the Court should be of opinion that there was no evidence, either upon the original or amended declaration, which ought to have been left to the jury. A rule for that purpose was obtained and was made absolute (1), the Court being of opinion that, coupling the expressions used with the conduct and position of the parties, the Defendant's words did not amount to an engagement to be primarily liable for the work, but only to a promise that if the Plaintiff would do the work on the credit of the board the Defendant would pay if the board did not; and that this was a promise to be answerable for the debt of another within sect. 4 of the *Statute of Frauds*, though in fact the board had never been indebted, and as this promise was not in writing it could not be enforced.

On appeal to the Exchequer Chamber this decision was reversed, that Court being of opinion that there was evidence to

(1) Law Rep. 5 Q. B. 613.

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go to the jury on the question whether the Defendant had not by his words made himself primarily liable (1).

This appeal was then brought.

Mr. *Cole*, Q.C., and Mr. *Francis Pinder*, for the Appellant, insisted that this was a promise to pay the debt of another, and, not being in writing, was void under the *Statute of Frauds;* that it was a contract of guarantie only, for that there was enough to shew that the board required the work to be done, and that there was no evidence under either the original or the amended declaration to go to the jury shewing that the Defendant had in any way made himself primarily responsible for the work, but that the words themselves proved that the Defendant meant, and the Plaintiff must so have understood them, that if the Plaintiff would do the work for the board the Defendant would see that he got paid.

Mr. *Lopes*, Q.C., and Mr. *Arthur Charles*, for the Respondent, were not called on.

THE LORD CHANCELLOR (Lord *Cairns*):—

My Lords, the question, and the only question, which your Lordships are called upon in this appeal to decide is, whether there was or was not evidence of an original liability on the part of the Defendant to pay the Plaintiff in the action for the work to be done. I begin by pointing out to your Lordships that that is the question, and the only question in the action, for the purpose of reminding you that we are not embarrassed here by any consideration as to whether the precise sum for which the verdict of the jury was returned, is the sum which ought to have been assessed as the amount to be paid in the action. Whatever questions might have been raised, whatever distinctions might have been made as to different items of the demand, this is not the time or the place for making them. If it was desired to make them, and if there was room for making them (which I am far from saying there was not), it ought to have been done at an earlier stage in these proceedings.

My Lords, taking the question raised by the rule which was

(1) Law Rep. 7 Q. B. 196.

obtained in the first instance, whether there was or was not evidence of an original liability on the part of the Defendant to pay the Plaintiff for the work to be done, I may remind your Lordships that that question falls to be determined really upon the consideration of the evidence of the Plaintiff in the action himself. It is true that another witness was called on behalf of the Plaintiff, but his evidence on this subject is quite immaterial, and we have the evidence of the Plaintiff only to deal with. My Lords, that evidence might have been accepted by the jurymen or it might have been rejected; they might have been so satisfied with the evidence adduced on the other side as to lead them to disbelieve the evidence of the Plaintiff, but the question, I repeat, is, whether or not in this case the learned Judge would have been right in directing a nonsuit on the ground that there was no substantial evidence to go to the jury.

Now I will call your Lordships' attention, for a few moments, to what the Plaintiff really did say, because, I think, if the two portions of his evidence, which at first sight appear rather disconnected, are brought into their proper order, a very clear and intelligible account of the origin of this contract will be given. The Plaintiff says in his cross-examination, referring to the 19th of March and to the resolution of the board of that date, "that notices should be served by the board," that is, notices upon the owners of houses who were to be required to connect their drainage with the main drainage of the town; "I knew nothing of this." And then, at another part, "*Adams* asked me if I would procure 1300 feet of pipes, and if I would do the work." He was asked two things; if he would procure the materials, and if he would do the work. "I said 'not unless the board would be responsible for the payment, for I would not take orders from the owners of the property.' I know they must have notices before they are liable. I think it is twenty-one days notice." Then a resolution of the board was put in "for notice to owners and occupiers, and that *Mountstephen* procure 1300 feet of pipes." That appears to have been communicated to him, as I gather from the next portion of his evidence, for he continues, "I proceeded then according to that order, but I refused to do the work unless the board would make themselves responsible."

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I understand that as being a very clear statement; it may be accurate or inaccurate, that is another question; but it is a very clear statement by the Plaintiff, that he had his attention called to the danger of proceeding in these cases without a distinct formal authority from a board, like the local board in this case, and that in the first instance he would neither procure materials nor do the work without the order of the board; that he got from the board a proper order with which he was satisfied with regard to the materials. He may have been right or wrong in thinking it a proper order, but he was satisfied with it; but he had no order of the board with regard to the work to be done, and he refused, therefore, to do that work.

Then, turning to another part of the evidence, we have from him an account of a conversation which took place between him and Mr. *Lakeman*, the Appellant, which must have been some days afterwards. He had finished some works connected with the main drainage, and he says: "We had just finished everything." *Lakeman* (the Defendant) said: "What objection have you to make these connections?" From which I should infer that *Adams* had told *Lakeman* that although the materials had been supplied, there was an objection to doing the work, "meaning the laying down of the junction pipes. I said: 'I have no objection to do the work, if you or the local board will give me the order.' He" (that is Mr. *Lakeman*) "was chairman of the Local Board of Health for *Brixham*. He said: '*Mountstephen*, you go on and do the work, and I will see you paid.'"

Your Lordships have had very ingenious arguments addressed to you, putting various constructions upon these few words. It has been suggested that the effect of these words was that *Mountstephen* must be taken to have asked Mr. *Lakeman* first for an order from the board, and to have been satisfied that he, as chairman of the board, could then and there give the order, and to have had through him then and there an order from the board, and yet that, not being satisfied with that order then and there thus obtained, he desired to superadd, and he had superadded to it, a virtual guarantie by *Lakeman* that he, personally, would guarantee that the board would pay the money. My Lords, I must say that that does appear to me to be a most strange and violent construc-

tion placed upon a few simple words. As it appears to me, a very natural meaning (and it is quite sufficient for the present purpose) of these words is this, that *Mountstephen* following up that course of action which he had previously pursued with *Adams*, stated to *Lakeman* that the reason why he refused to do the work was, that he had got no order from the board to do it, that he would do the work if he had a formal order from the board, or if he had a personal order from *Lakeman* himself, and that thereupon Mr. *Lakeman*—who for some reason, the stringency of which it is not for your Lordships now to inquire into, wished the work to be immediately done—that thereupon Mr. *Lakeman* said: "You go on and do the work; do not concern yourself upon the subject of whether you have an order from the board, or have not such an order. You go on and do the work, and I will be your paymaster. I will see you paid." Now, my Lords, if that is the meaning of these words, and it appears to me certainly to be the *primâ facie* and natural meaning of the words, I think there was ample and strong evidence to go to the jury that the go-by was entirely given to the question of an order of the local board, and that Mr. *Lakeman* stepped in and undertook himself, as a matter of primary liability, to pay for the work that would be done. Against that primary liability he might afterwards, as chairman of the board, have sheltered himself by obtaining from the board the consent to make a formal order, and acting upon and paying under that formal order. But that was for him to consider; he did that which the contractor required to be done—he put the contractor in the position of having then and there an absolute contract made—and the only contract which then and there absolutely could be made, would be a personal and primary contract by him to pay the contractor for the work to be done. My Lords, it appears to me that there was clearly substantial evidence in the case to go to the jury, and that any Judge who had to try this case would have miscarried, if upon this evidence he had held that there was no case to go to the jury.

I shall, therefore, submit to your Lordships that the decision of the Court of Exchequer Chamber is correct, and that this appeal should be dismissed.

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LORD HATHERLEY :—

My Lords, I entirely concur with my noble and learned friend on the woolsack, and I look upon the case exactly in the same way as he does, namely, that there is contained in the conversation which is deposed to by the Plaintiff evidence sufficient for the jurors, if they thought fit to act upon it.

LORD O'HAGAN :—

My Lords, I am of the same opinion as the noble and learned Lords who have preceded me, and substantially for the same reasons.

It is enough to say that, in my mind, there was ample evidence to go to the jury, and upon which the verdict of the jury could properly be pronounced. I think it right to say that our judgment does not in the slightest degree fritter away the *Statute of Frauds*, or weaken any substantial principle of law. It proceeds merely upon the ground that there was evidence to go to the jury. It is upon that ground that I understand the House to say that this appeal must be dismissed.

LORD SELBORNE :—

My Lords, I am of the same opinion.

There are some observations in the opinions of the learned Judges in the Court of Queen's Bench which certainly do look at first sight as if some of those learned Judges thought that there might be a valid contract of suretyship, or a secondary liability upon the principle of a guarantie for the debt of some one else, to which the law relative to that description of contracts would apply, although there might be in truth no principal debtor. If that was the view of the learned Judges, with all respect to them, I must confess myself unable to follow it. There can be no suretyship unless there be a principal debtor, who of course may be constituted in the course of the transaction by matters *ex post facto*, and need not be so at the time, but until there is a principal debtor there can be no suretyship. Nor can a man guarantee anybody else's debt unless there is a debt of some other person to be

guaranteed. The tendency, therefore, of any view of this contract which would place it in the position of a guarantie for a future liability to be undertaken by the local board, would be absolutely to defeat the whole purpose of the communication, which was to remove a difficulty then pressing upon the mind of the contractor, as to whether or not he had sufficient authority from any one to go on with the work; and the answer was given in terms *de præsenti* for the express purpose of inducing him at once to go on.

The next construction suggested was one which would make it fulfil, as has been said by my noble and learned friend on the woolsack, the double office of an order given by the chairman on behalf of the board, to do the work, and a personal guarantie for the liability of the board so engaged in by the chairman on their behalf. Upon that view, which is certainly put as a possible construction of this conversation by Mr. Justice *Blackburn*, I cannot but observe that the argument founded upon it seems to me to be *felo de se;* because, if I rightly understand the law laid down in the case of *Cherry* v. *The Colonial Bank of Australasia* (1) the necessary result of such a construction of the words would be, to make the Defendant liable upon the first count in this declaration. The words so used, if that was the sense in which they were understood and intended by both parties, would have been in no degree less strong, for that purpose, than the words which were held to be a warranty of authority in the case of *Cherry* v. *The Colonial Bank of Australasia* (1). There two directors signed a paper in these words: "Sir, we have to inform you that we, as directors of the company," naming it, "have appointed Mr. *Clarke* to be legal manager of the company, and have authorized him to draw cheques upon the account of the company." They had not *per se*, by the constitution of the company, power to give that authority; and they did not take the necessary steps to get it from the company. Those words, though expressly saying that they had done this as directors, were held to be a representation, making themselves personally liable, that they possessed the authority which they did not possess. And if the first words of this conversation could properly have been held to bear the construction suggested by Mr. Justice *Blackburn*, then, unless the board had been really

(1) Law Rep. 3 Priv. C. 24.

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and truly liable, which I do not collect to have been the view of any one of the learned Judges in the Court of Queen's Bench, I apprehend that the verdict of the jury would still have been right, and the case could not have been withdrawn from the jury, because, in that view, the evidence would have been strong in support of the first count of the declaration.

It has been argued at your Lordships' Bar by Mr. *Pinder*, feeling, no doubt, the force of that view, that there is matter upon this evidence—and I suppose it must be upon the Plaintiff's evidence—from which your Lordships ought to conclude that the board was actually liable. My Lords, I must say I cannot see a particle of evidence which justifies any such argument; and it does not appear to me that in either of the Courts below any learned Judge thought that there was any such evidence.

Judgment of Court of Exchequer Chamber affirmed, and appeal dismissed with costs.

Lords' Journals, 5th May, 1874.

Attorneys for the Appellant: *Church, Sons, & Clarke.*
Attorney for the Respondent: *G. E. Philbrick.*

ROBERT COOK . . . . . APPELLANT;

AND

JOHN FOWLER, J. G. WOOD, AND J. ROBERTS . . . . . } RESPONDENTS.

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March 24;
May 15.

Warrant of Attorney—Defeazance—Interest on Money secured.

Where a written security is given for the payment of money at a certain day, with interest up to that day, and the sum secured and the interest thereon are not paid at the day, the principal and interest become from that time a debt which, when recovered by legal process, may, in the discretion of a jury or of the Court, be made the subject of an additional liability, which, however, is not properly a liability to interest according to the contract, but to damages for the breach of it.

Per LORD CHELMSFORD:—The defeazance of a warrant of attorney is not a contract, but merely a description of the object of the security, and of the means of enforcing payment.

Per LORD SELBORNE:—There is no rule of law that, upon a contract for the payment of money on a day certain, with interest at a fixed rate, down to that day, a farther contract for the continuance of the same rate of interest is to be implied.

A warrant of attorney was given to secure payment of a sum of money. Its date was the 2nd day of May, 1864, and the defeazance was in these terms:—"The within written warrant of attorney is given for securing the payment of the sum of £1330, with interest thereon, at and after the rate of £5 per cent. per month, on the 2nd day of June next. Judgment to be entered up forthwith," &c.:—

Held, that this was nothing more than an authority to enter up a judgment for these various sums, to be ascertained on the 2nd of June, 1864, after which time the holder would merely stand as a creditor for the sums so ascertained, and the statutable rate of interest thereon that might be allowed him by a jury or by the Court.

THIS was an appeal against a decision of Vice-Chancellor *Stuart*. *William Bevan*, late of *Stapleton*, in the county of *Gloucester*, was indebted to *Cook* (among other persons), and on the 2nd of May, 1864, gave him a warrant of attorney, the defeazance of which was in the following terms:—

"The within warrant of attorney is given to secure the payment of the sum of £1330, with interest thereon at and after the rate of £5 per cent. per month, on the 2nd of June next, judgment to be entered up forthwith; and in case of default in payment of the said sum of £1330, and interest thereon, on the day aforesaid,

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execution or executions, and other processes may then issue for the said sum of £1330 and interest, together with costs of entering up judgment, &c., &c., and all other incidental expenses whatever." No judgment was entered up. *Bevan* made his will on the 3rd of May, 1864, and made *Wood* and *Roberts* his executors and trustees; he died on the 25th of the same month, and *Wood* and *Roberts* duly proved his will. A creditor's suit for the administration of the estate of *Bevan* (*Robinson* v. *Wood*) was afterwards instituted, and the Appellant came in as a creditor under that suit, but did not give any particulars of his demands against *Bevan's* estate. On the 11th of March, 1867, *Wood* and *Roberts* therefore filed their bill against *Cook*, praying for accounts, for liberty to redeem any premises comprised in securities given to him, Appellant, by their testator, and then alleged to be held by him, and for costs. The Appellant put in an answer on the 14th of May, 1867, in which he referred to mortgages made to him by *Bevan* of certain lands in *Ballin*, in the county of *Westmeath*, and in *Shire Newton*, in the county of *Monmouth* (1). He also declared his readiness to account, stated the warrant of attorney, and claimed the principal sum due under it, with interest thereon at the rate of 5 per cent per month. Both the suits came on for hearing before Vice-Chancellor *Stuart*, and an order was made for taking the accounts. The Chief Clerk made his certificate on the 8th of March, 1869, allowing the rate of interest claimed by the Appellant. On the 12th of March, *Fowler*, as a creditor of *Bevan*, took out a summons to vary the Chief Clerk's certificate, and on the 7th of July, 1869, the Vice-Chancellor made an order varying it by allowing interest at 5 per cent. for the month, from the 2nd of May, 1864, to the 2nd of June, 1864, after which he fixed the rate of interest at only 4 per cent. per annum.

This was the order now appealed against.

Mr. *E. K. Karslake*, Q.C. (Mr. *F. H. Daly* was with him), for the Appellant:—

Whenever a security is given for the payment of money with

(1) All these circumstances are so fully referred to by the Lord Chancellor, one portion of his judgment being expressly founded on them, that it has been deemed unnecessary to set them out here at length.

interest at a certain time, and payment is not then made, the rate of interest continues afterwards to be that which was fixed by the instrument securing it. Here is a valid instrument of security, and the particular rate of interest is settled by agreement between the parties. The Appellant here had had other transactions with *Bevan*, and was, in fact, mortgagee of two properties, one in *Ireland* and one in *Monmouthshire*, and he had also a charge on a house in *Bristol*. He entered into an arrangement to give up his securities on having payment made to him. That payment must be calculated on the footing of those securities. The amount of interest given in ordinary cases by the Court can only apply where there has not been any stipulated amount of interest settled by agreement between the parties. Here the amount has been expressly settled between them. The defeazance of this warrant of attorney gave to the Appellant in direct and express terms the interest now claimed, and there is no rule of construction applicable to such an instrument which, either at Law or in Equity, requires that the Appellant should accept a less rate of interest than what had so been agreed upon. Here is an express contract. There is no ground on which a Court can be called on to vary it. By the law as it now stands, any person is entitled to contract to pay any rate of interest, and such a contract is perfectly valid. If the time at which the principal of any money bearing interest ought, by the terms of a written contract, to be paid, is allowed to expire without payment, the party entitled to the payment may, in an action for the principal, recover the same interest from the date of the last payment of it: *Price* v. *Great Western Railway Company* (1). That case shews that where nothing is said of future interest, it will continue as of course; and Mr. Baron *Parke* gave in that case the reason for the rule, saying: "Because the deed shews the intention of the parties that it should be a debt bearing interest." That rule had previously been adopted in *Atkinson* v. *Jones* (2), which was the case of a warrant of attorney, given by a third person to secure the due payment of interest on a debenture; the Court would not interfere to enter satisfaction upon the roll, it not being sufficiently clear from the defeazance that the warrant of attorney was intended to cover only the interest up to the day named.

(1) 16 M. & W. 244. (2) 2 Ad. & El. 439.

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So that the Court must have considered that the warrant of attorney would cover the same interest accruing after the day named. [THE LORD CHANCELLOR:—Suppose a promissory note, payable twelve months after date, but not paid at the time, what interest would be given on it by the jury?] That which had been stipulated for between the parties. If they had fixed the interest at 3 per cent., of course it would not be increased; if they had fixed the interest at 6 per cent. or more, that would be given —it would not be diminished; "the intention of the parties," as Mr. Baron *Parke* said, would afford the guide. Here the rate of interest had been expressly agreed upon.

Mr. *Dickinson*, Q.C., and Mr. *Hemming*, for the Respondents:—

Interest may now of course be stipulated for to any amount the contracting parties think fit; but if stipulated for up to a certain time, the liability to pay that interest does not go on continuously. The interest, as interest, ceases at the time mentioned. If the contract is not performed at the time, the amount recoverable, in addition to that stipulated for, is recoverable not as continuing interest, but as damages for breach of the contract to pay. Now, those damages are not necessarily to be measured by the quantum of the interest agreed upon by the parties themselves. The statute 3 & 4 Will. 4, c. 42, s. 28, which gives to a jury the power to assess damages for non-payment of money, expressly says that the jury may give such damages "if they shall think fit;" so that, so far from being obliged to give them, and to measure them by the amount of interest secured by the instrument, they may refuse the damages altogether. This case does not come within those referred to on the other side. The debenture in *Price* v. *The Great Western Railway Company* was declared to be a mortgage. A warrant of attorney is not a mortgage, it is a personal contract to secure payment of a debt, and in this instance that debt was to be paid, with stipulated interest upon it, at a time certain. If not paid then, the contract was broken, and all that could afterwards be recovered would be damages for the breach of it. In a note to *Mounson* v. *Redshaw* (1), it is shewn that interest even upon a mortgage deed, accruing after the day fixed in the deed, does not

(1) 1 Wm. Saund. 201, n; see also *In re Kerr's Policy*, Law Rep. 8 Eq. 331.

become part of the debt, but is to be treated as damages for the detention of the debt. An excessive amount of interest submitted to for a time upon particular pressure, is certainly not a thing which, contrary to all legal analogies, the Courts would continue upon mere implication. The money claimed after the day stipulated, not being interest as stipulated, must be in the discretion of the Court, and must be that which the statute, or the rules of practice, would prescribe.

Mr. *Karslake*, in reply:—

The warrant of attorney here, though it may not be a mortgage, is equivalent to a charge by a debtor on his land, and may be treated as an equitable mortgage. It cannot be argued that, because the judgment was not entered up at the end of the month, the instrument ceased to be a security at all. Yet, if not so argued, it is a valid and still subsisting security for the money mentioned in it according to the mode there mentioned, both as to principal and interest. If this instrument had only given interest at 6 per cent., no Court would have reduced that amount to 5 per cent. Then, on what principle can it be reduced now?

THE LORD CHANCELLOR (Lord *Cairns*), after stating the facts of the case, said:—

So far as the literal construction of that warrant of attorney and defeazance goes, your Lordships will observe that there is no notice of any contract of debt, or of any contract for forbearance of money for any length of time beyond the time specified upon the face of the defeazance. It is an authority to enter up judgment, and a stipulation that execution is only to issue in one way and for one purpose. It is to issue on the 2nd of June following the date of the warrant of attorney—it is to issue then "in default of payment of £1,330 and interest thereon," which, of course, means the interest stipulated at the rate of 60 per cent. "on the day aforesaid"—that is, on the 2nd of June; and then in that case "execution and other process may issue for the said sum of £1330 and interest" (which, of course, must necessarily mean interest at that rate and due up to that day), "together with the costs of entering up judgment, registering the same, and writ and writs

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of execution or executions, sheriffs' poundage," and so on. Therefore, taking the literal construction and effect of this warrant of attorney and defeazance, it would appear to me to amount to an authority to issue execution on the 2nd of June for one total sum, which is to be composed of the principal sum of £1330, interest at 60 per cent. up to the 2nd of June, and those expenses, unascertained in the first instance, but to be ascertained at the time described, as expenses of sheriffs' poundage, and other matters of the same kind.

My Lords, it appears to me that, upon the literal construction of this instrument, it is nothing more than an authority to enter up a judgment, which would be substantially a judgment for those various sums, their amount to be ascertained on the 2nd of June, 1864; and that then, if execution is not levied at that time, and payment is not at that time enforced under the execution, the judgment creditor would stand from that time forward as a creditor for the sum for which he might then have levied, together with the ordinary statutable rate of interest upon that sum—namely, the rate of 4 per cent.

My Lords, if that view should be adopted (and it appears to me that it might safely be adopted in this case), there would be no necessity to go farther. But I will ask your Lordships to consider also the alternative view by which, I think, the same conclusion will be arrived at. If this is not merely a judgment for the principal sum and the amount of interest, and costs up to the 2nd of June, which judgment is thenceforward to bear interest at the rate of 4 per cent., it is, at all events, a warrant of attorney and defeazance which is given to secure a debt of £1330 with interest up to a certain day, and without any mention of subsequent interest upon the face of the instrument. If so, according to the well-known principle which has been referred to in many cases, and which may be taken most conveniently from a note to the case of *Mounson* v. *Redshaw* (1), any claim, in the nature of a claim for interest after the day up to which interest was stipulated for, would be a claim really, not for a stipulated sum and interest, but for damages, and then it would be for the tribunal before which that claim was asserted to consider the position of the claimant, and

(1) 1 Wm. Saund. 201, n.

the sum which properly, and under all the circumstances, should be awarded for damages. No doubt, *primâ facie,* the rate of interest stipulated for up to the time certain might be taken, and generally would be taken, as the measure of interest, but that would not be conclusive. It would be for the tribunal to look at all the circumstances of the case, and to decide what was the proper sum to be awarded by way of damages.

Apply that to the present case, and let me ask your Lordships to look for a moment at the very peculiar circumstances of the present case. This warrant of attorney and defeazance or judgment was given by *William Bevan* on the 2nd of May, 1864. He died on the 25th of the same month, which was before the time stipulated for the payment of the principal sum with the high rate of interest, namely, the 2nd of June. It appears that his executors were not aware of this warrant of attorney, or of the stipulations in the defeazance. On the 11th of June, a few days after his death, an administration suit was instituted, the suit of *Robinson* v. *Wood;* and, on the 25th of June, the usual decree was made in that suit for the administration of the estate of the testator. On the 4th of July, 1864, the present Appellant, *Cook*, filed a bill—the suit of *Cook* v. *Wood*—as a judgment creditor and mortgagee of the testator, alleging, what was the fact, that he had various claims against the testator as a mortgagee, and in other characters, but giving no specification and no particulars with regard to this warrant of attorney and defeazance. Finding that he was asserting rights as a creditor generally, the executors adopted the usual course. He was served with a notice of the decree in *Robinson* v. *Wood,* which of course stayed his own suit; but he did not come in and prove his debt, or explain the character of the security which he held. On the 11th of March, 1867, that is to say, after *Cook* had lain by for nearly three years, the executors, inasmuch as he had not come in under the suit and claimed to have securities as a mortgagee, were forced to file a bill against him, which is the bill in *Wood and Roberts* (the executors of *Bevan*) v. *Cook.* That bill was filed on the 11th of March, 1867, it was a bill for an account, and to redeem whatever securities he might hold, the Plaintiffs alleging that *Cook* would not

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disclose the particulars of his securities. On the 14th of May, 1867, *Cook* put in his answer in that suit, and referred to the judgment which had been entered up under this warrant of attorney, but referred to it in general terms, without giving any details as to the rate of interest which he claimed to be running on under the warrant of attorney. On the 12th of June, 1868, an agreement was come to between *Cook* and the executors, who were still without information as to the details of this defeazance. By that agreement, although the time for proving debts in the first suit of *Robinson* v. *Wood* had passed, *Cook* was to be admitted to come in as a creditor in *Robinson* v. *Wood* for whatever might be found to be due to him. Under that agreement, on the 28th of November, 1868, that is to say, more than four years after the death of *Bevan*, an affidavit was filed by *Cook*, for the first time giving the particulars of this warrant of attorney and defeazance, upon which his case now rests, and upon which he claims that interest had been running on during the whole time at the rate of 60 per cent.

Now, my Lords, if this is to be judged of (and it is the most favourable view of the case that can be taken on behalf of the Appellant that it should be so judged of) as a case in which *Cook* is coming and claiming damages for the non-payment of a debt due to him on the 2nd of June, 1864, it appears to me to be clear that any tribunal judging of that claim for damages would be bound to take into account the circumstances to which I have referred—circumstances which shew that *Cook* was endeavouring to prevent the character of this defeazance from transpiring—that he was endeavouring to keep back his security, and thereby to become entitled to claim this high rate of interest, whereas it is obvious that if he had at the first disclosed the nature of the claim in respect of interest which he was prepared to allege, steps would have been taken to pay off the principal sum that was due to him.

Therefore, whether your Lordships take it as a judgment for a specific sum, bearing no interest beyond the statutable interest of 4 per cent., or whether you take it as a claim for damages for the detention of a debt, in either case it appears to me to be out of

the question that the rate of 60 per cent. could be allowed. It appears to me that in the first view the rate of 4 per cent. is the rate absolutely assigned by statute upon the payment of judgment debts; and, in the second case, it is for the tribunal to fix the rate of damages. It is possible that the rate of 5 per cent. might be given by a jury or by a Judge who was performing the functions of a jury; but the primary Judge having in this case only given the usual rate assigned in the Court of Chancery, namely, 4 per cent., I certainly do not propose to advise your Lordships to disagree with that opinion at which he has arrived, but, on the contrary, I advise and move your Lordships that this appeal should be dismissed with costs.

LORD CHELMSFORD :—

My Lords, I think the order of Vice-Chancellor *Stuart* refusing the Appellant interest at the rate of 5 per cent. per month after the 2nd June, 1864, and allowing him interest at 4 per cent. per year from that day, is right and ought to be affirmed.

There is no authority that I can find to support the argument of the counsel for the Appellant, that where a security for money payable at a certain day stipulates for the allowance of a certain rate of interest up to the day fixed for payment, interest at the same rate is implied to be payable afterwards. On the contrary the distinction seems to be well established between cases where the interest is expressly reserved in the instrument, and where it is not. In the latter case it is recoverable, not as interest according to the contract, but as damages for the breach of it.

In the present case there is properly speaking no contract. The defeazance of a warrant of attorney is not a contract, but merely a description of the object of the security and of the means by which the judgment creditor, in case of the debtor's default, may enforce payment of the sum secured. That sum in the present case is £1330, with interest at and after the rate of £5 per cent. per month on the 2nd of June. If the judgment had been entered up on that day up on the default of payment, execution might have been issued immediately for the principal sum and interest at the rate specified. Or the Appellant might have brought his action upon the judgment, and might have

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recovered farther interest, not as interest *eo nomine*, but by way of damages.

The Appellant, by delaying to enter up judgment, cannot place himself in a better position than if he was a judgment creditor. And as he would then, according to the practice of the Court, have been allowed interest only at 5 per cent., so the allowance by the Vice-Chancellor of that rate of interest after the 2nd of June, 1864, is as much as he is entitled to.

LORD HATHERLEY:—

My Lords, I entirely concur with the judgment which has been proposed to your Lordships, and in the opinions which have been expressed by the two noble and learned Lords who have preceded me.

The question as to whether interest should be calculated at the rate mentioned in the original warrant of attorney resolves itself simply into this: Is there or is there not any contract after the day upon which judgment was to be entered up for the payment of any specific sum and interest? The cases which were cited with reference to mortgages, shew clearly that the interest, after a given day upon which day the principal and interest secured by the mortgage were made payable, can only be given in the nature of damages. Among the numerous cases which may be cited in which this point has been fully discussed, I will just take leave to refer your Lordships to one, because it contains some observations of Mr. Justice *Bayley*, which seem to me to be peculiarly applicable to this case. The case to which I refer was the case of *Cameron* v. *Smith* (1). The simple point in that case was whether or not a petitioning creditor's debt in bankruptcy could be supplemented by adding interest to his debt (which the Commissioners had done) when there was no express stipulation for interest, and it was there held that that could not be done, because the Commissioners had no power to award damages after the bankruptcy, and as any interest that could be allowed would have to be allowed by way of damages and not by way of interest, it was beyond the province of the Commissioners. In considering the

(1) 2 B. & Ald. 305.

case Mr. Justice *Bayley* makes these observations,—"Although, by the usage of trade, interest is allowed on a bill, yet it constitutes no part of the debt, but is in the nature of damages, which must go to the jury, in order that they may find the amount; and it is competent for them either to allow 5 per cent. or 4 per cent., according to their judgment of the value of money; or they may even allow nothing, in case they are of opinion that the delay of payment has been occasioned by the default of the holder"—that is, the holder of the instrument.

My Lords, I think that in this particular case the Appellant could not put his case higher than the two ways in which it has been put by my noble and learned friend on the woolsack; namely, to treat the case either as a judgment actually entered up, which it was not, or else as a claim to damages in consequence of the default of payment, and in that case really it would only come within the ordinary rule of the Court of Chancery, which is to allow interest at the rate of 4 per cent.

LORD SELBORNE:—

My Lords, unless it can be laid down as a general rule of law, that upon a contract for the payment of money borrowed for a fixed period, on a day certain, with interest at a certain rate down to that day, a farther contract for the continuance of the same rate of interest after that day, until actual payment, is to be implied, the decision of the Vice-Chancellor in this case is not erroneous.

I entirely agree with those of your Lordships who have preceded me that no such contract is to be implied, unless there is something to justify it, upon the construction of the words of the particular instrument; and that, although in cases of this class interest for the delay of payment *post diem* ought to be given, it is on the principle, not of implied contract, but of damages for a breach of contract. The rate of interest to which the parties have agreed during the term of their contract may well be adopted in a ordinary case of this kind by a Court or jury, as a proper measure of damages for the subsequent delay; but that is because, ordinarily, a reasonable and usual rate of interest, which it may be presumed would have been the same whatever might be the duration

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of the loan, has been agreed to. But in the case before your Lordships the agreed rate of interest is excessive and extraordinary; and, although no question is raised between the present parties as to its fairness or reasonableness, so far as it was matter of express contract, it by no means follows that it would have been fair and reasonable, or would have been so regarded by the borrower, if it had been indefinitely extended to every possible delay of payment after the stipulated time. In my opinion no Court or Judge could, under the particular circumstances of this case, have adopted that rate of interest as a proper measure of damages, without a very great miscarriage of justice.

I entirely agree in the motion which my noble and learned friend upon the woolsack has submitted to your Lordships.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 15th May, 1874.

Solicitor for Appellant: *J. McDiarmid.*
Solicitors for Respondent: *Thos. White & Sons.*

OSBORNE HILLIARD . . . . . APPELLANT;

AND

LUKE EIFFE . . . . . RESPONDENT.

1874
March 23;
April 27;
May 15.

Suit by Legatee alone—20 & 21 *Vict. c.* 79, *s.* 68.

A bill to set aside a deed containing charges of fraud which the Court deems not to be proved, will be dismissed as to those charges, but need not be dismissed altogether, if there are other charges which the Court deems to constitute what amounts to great irregularity and legal fraud, and to require the granting of the relief prayed.

Where, in a bill to set aside the grant of an annuity made by *A.* to *B.*, and charged upon *A.*'s land, with also a personal covenant for payment, the Plaintiff is himself the devisee as well as residuary legatee under *A.*'s will, he ought, under the 20 & 21 Vict. c. 79, s. 68 (Ir.), to give notice to the other party that he intends to give in evidence, as proof of the devise or testamentary disposition, the probate of the will. But if he should fail to give this notice, the omission would only create a technical difficulty in the case, and the Court might, properly, and would adjourn the hearing to give an opportunity to remove that technical difficulty.

Where in such a case the objection was likewise made that the Plaintiff was legatee and had not proved the assent of the executor to the legacy, nor his insolvency, nor his refusal to sue, nor collusion on his part; but the Vice-Chancellor overruled the objection (relying on the case of *Consett* v. *Bell* (1)), and the Defendant, though carrying the case to the Court of Appeal in Chancery, did not present to that Court this or the previous objection to the Vice-Chancellor's decision:—

Held, that he could not afterwards, on bringing up the case to this House, present these objections in argument as objections which might be made here to the decision of the Court of Appeal.

THIS was an appeal against a decision of the Vice-Chancellor of *Ireland*, which had been affirmed on appeal by the Lord Chancellor (Lord *O'Hagan*), and the Lord Justice of Appeal, *Christian*.

John Norton, formerly a captain in the 34th Regiment of Foot, had, on the 19th of February, 1864, executed a deed by which he created in favour of one *O'Brien Hilliard*, a son of the present Appellant, and then under age, a perpetual annuity of £100, to commence from his own, *Norton's*, death. The annuity was charged on his real estate, and likewise secured by a covenant affecting his personal estate. The annuity was to be payable by half-yearly payments on the 1st of May

(1) 1 Y. & C. C. C. 569.

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and the 1st of November in each year. Mr. *Norton*, on the 28th of January, 1867, made a will by which he gave the interest of £2000 to his sister for her life, and a legacy to each of his executors, and the rest of his property to his relative, *Luke Eiffe*, the present Respondent, absolutely. He appointed *William Lyons* and the Rev. *Francis Heaton* his executors. Mr. *Norton* died on the 2nd of February, 1867. Mr. *Luke Eiffe* was then under age. Mr. *Lyons*, alone, on the 6th of March, 1867, proved the will. On the 26th of June, 1867, the Appellant, in the name and on behalf of his son, commenced an action in the Court of Queen's Bench in *Ireland* against Mr. *Lyons*, the executor, to recover the first half-yearly payment of the annuity, which by the terms of the deed had become due on the 1st of May preceding. This sum was paid, but the payment was accompanied by the following protest:—"This payment is made without prejudice to the validity of the claim being contested by Mr. *Luke Eiffe*, the owner of the property charged with the annuity, upon his coming of age, and is not to be considered as in any way a recognition of the validity of the demand of the Plaintiff, or to prevent such being contested." Mr. *Eiffe* became of age on the 23rd of September, 1867. On the 5th of November in that year a second action was commenced by Mr. *Hilliard* to recover the second half-year's portion of the annuity, which, by the terms of the deed, was to become payable on the 1st of November. On the 14th of November, 1867, Mr. *Eiffe* exhibited his bill of complaint in Chancery against *Osborne Hilliard*, the father of the annuitant, and *O'Brien Osborne Hilliard*, the annuitant himself, to which bill Mr. *Lyons*, the acting executor under *Norton's* will, was (on account of his payment of the first instalment of the annuity) also made a Defendant, alleging various circumstances, which were charged as constituting undue influence exercised by the first-named Defendant over *Norton* in order to procure, and which it was declared had procured, the grant of the annuity in question (1). Answers were put in, and the cause was heard before the Vice-

(1) There were in the bill certain charges of fraud which were deemed by the Court below to be entirely unproved, and as to them the bill was dismissed, and costs ordered to be paid to the Defendant. It was insisted for the Appellant (Defendant below) that as the Plaintiff had failed in supporting these, his bill ought to have been altogether dismissed. As to this matter, see Lord *Chelmford's* and Lord *Hatherley's* opinions, *post*, pp. 51, 52.

Chancellor of *Ireland* on written and oral testimony. The will was not proved *per testes*, nor was any notice given to the Defendants in the suit that the probate would be produced as proof of the devise of real estate, but the probate was produced in the ordinary way. No evidence was given of collusion with the executor, or of his insolvency, or of his having refused to sue. An objection was, on these grounds, raised to the maintenance of the suit. His Honour, on the 26th of November, 1868, delivered judgment on the question raised as to the frame of the suit, and, on the authority of *Consett* v. *Bell* (1), held it to be maintainable. On the 9th of December, 1868, he pronounced a decree directing that the deed should be delivered up to the solicitor of the Plaintiff in the equity suit to be cancelled. *O'Brien Osborne Hilliard*, the annuitant, died on the 29th of January, 1869, leaving his father his heir, and on the 11th of February, 1869, the suit was ordered to stand revived as against Mr. *Hilliard*, the father, and as against the nominal Defendant, *Lyons*. Mr. *Hilliard* appealed against the Order of the Vice-Chancellor, and the appeal was argued in April. On the 31st of May, 1869, the Lord Chancellor, Lord *O'Hagan*, and the Lord Justice of Appeal, *Christian*, affirmed the Order of the Vice-Chancellor. The present appeal was then brought. In support of the appeal two objections were set forth in the 13th and 14th "Reasons" at the end of the Appellant's case in this House. These were:—13. "Because the Plaintiff has not by his bill averred, nor has he proved, a state of facts shewing a right or title in him to maintain the suit, which should have been instituted by the Defendant *Lyons* as the acting executor of *Norton's* will." The 14th reason. "Because this suit has been instituted by the Plaintiff as residuary devisee and legatee of that will seeking relief as against the Appellant and against *Lyons* as such executor in respect of the real and personal estate respectively of the late *John Norton*, and because, as regards such real estate, the will had not been duly proved therein, and as regards such personal estate, no assent to said residuary bequest by said executor, or any collusion on his part with the other Defendants, or either of them, nor insolvency, has been averred or proved therein, nor has any evidence been therein given that the funeral and testamentary expenses, debts, and

(1) 1 Y. & C. C. C. 569.

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general legacies have been paid, nor of said executor having declined to institute a proceeding for the purpose of setting aside the said deed, nor have any special circumstances been alleged or proved, shewing why a suit for that purpose has not been, or should not be, instituted by the said executor." The Respondent's "Reasons" took no notice of these objections, but were addressed to the merits of the case.

Mr. *J. Napier Higgins*, Q.C., and Mr. *Mulligan* ~~(of the Irish Bar)~~, pressed these two objections on the attention of the House. The 20 & 21 Vict. c. 79: "An Act to amend the Law relating to Probates and Letters of Administration in *Ireland*" provides, sect. 65, that where a will affecting real estate is to be proved in solemn form notice shall be given to devisees or persons affected by the will, and, sect. 66, where the will is proved in solemn form, the decree of the Court shall be binding on persons interested in the real estate; sect. 68 enacts that the party relying on a devise or testamentary disposition shall give the other party this notice; "In any action at law or suit in equity where, according to the existing law, it would be necessary to produce and prove an original will in order to establish a devise, &c., affecting real estate, it shall be lawful for the person intending to establish in proof such devise, to give to the opposing party seven days' notice that he intends, at the trial or other proceeding, to give in evidence, as proof of the devise or testamentary disposition, the probate of the will; and the probate shall be sufficient evidence of the will and its validity and contents, unless notice is given that the validity of the devise or testamentary disposition is intended to be disputed." Nothing of that sort had been done here, no such notice had been given, nor was the execution of the will proved. Nothing had been done to shew a title in the Plaintiff to the real estate; nor with respect to the legacy had there been any evidence given that the executor had assented to the legacy, so that nothing had been done to shew a title in the Plaintiff to any part of the personal assets. [LORD SELBORNE:—Does it appear that the Defendant gave notice to the other side that this objection would be taken?] There was no need of notice, the provisions of the statute had created a duty which the Plaintiff was bound to dis-

charge; they shewed what the Plaintiff might do, and what he ought to do, and, not having done it, the objection arose of itself.

The point which relates to a suit by a legatee is very important. The Vice-Chancellor himself so considered it, and discussed it at some length, but decided it against the Appellant. For that decision he relied on the case of *Consett* v. *Bell* (1), but that case is really no authority for the decision in the present (2).

There was no Plaintiff here in respect of the real estate, for

(1) 1 Y. & C. C. C. 569.

(2) The objections to the frame of the suit thus made the subject of these reasons for the appeal had been fully discussed in the Court of the Vice-Chancellor, and, after stating the nature of both objections (see his observations, as to the will, quoted by the Lord Chancellor, *post*, p. 48), he had pronounced on the objection relating to the legatee the following judgment:—

"The rule originally was, as laid down by Lord *Redesdale* in his treatise and in the earlier cases, that there must be either collusion with, or insolvency of, the personal representative, pleaded and proved, to entitle a creditor or legatee to sue for recovery of assets. This rule was first relaxed in cases where the personal representative of a deceased partner was sued with a surviving partner (as in *Bowsher* v. *Watkins* (1 Russ. & Myl. 277)) for reasons unnecessary now to be considered. It was farther relaxed when there was proved to have been an express refusal of the personal representative to sue, and the more readily when the assets in question were only recoverable in Equity. It was said in some of the cases where this was done, that such refusal might be deemed evidence of collusion, within the original rule. But I think that this is too narrow a ground on which to rest the decision, as there are many cases where such a refusal could not have been ascribed to collusion. In *Lancaster* v. *Evors* (4 Beav. 158) Lord *Langdale* held that a refusal by the executors to recover certain assets was in itself sufficient to take the case out of the rule, and he also seemed to be of opinion that the rule only applied to a proceeding against a debtor to the estate, and did not extend to a proceeding to realize a specific fund in Court for the augmentation of the assets. But the case which appears to me to come nearest the present is that of *Consett* v. *Bell* (1 Y. & C. C. C. 569). There one of the Defendants named *Wilson* claimed a sum of money under a deed executed to him by the testator, and the executors, believing the deed to have been obtained *bonâ fide*, paid him the money. They afterwards, having reason to think that the deed was not valid, called on *Wilson* to refund, which he refused to do. The Plaintiff, who was an infant, and a devisee and legatee in the will, filed a bill against the executors and *Wilson* and others for the purpose (amongst others) of setting aside the deed as fraudulent and obtained by undue influence, and praying that *Wilson* might be ordered to refund the sum which he had recovered from the executors, and for the administration of the assets of the testator. *Wilson* raised the point that the Plaintiff's remedy was against the executors, and not against him, and relied upon the general rule that a legatee cannot sue a stranger indebted to the estate or holding part of the estate.

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there was nothing done, according to the requirements of the statute, by which title to the real estate was shewn. And there was likewise no Plaintiff in respect of the personal estate, for a mere legatee cannot sue in such a case as this, unless he shews a refusal on the part of the executor to sue, or collusion, or insolvency. The reason for the rule is obvious; if it did not exist there might be as many suits as there were persons claiming to be legatees or creditors. The rule itself is of old standing, and was acted on in *Bickley* v. *Donington* (1), and exactly adopted in *Alsager* v. *Rowley* (2). In the former of these cases the Lord Chancellor (Lord *Hardwicke*) said: "The whole management of the estate belongs to the executor, and the right of it is vested in him, and not to be taken out of him by creditors or legatees. If he releases and is solvent, it is a devastation, and he is answerable himself for the sum released to the creditors and legatees. If collusion and insolvency, it may be proper to come here for satisfaction against the debtor, but it must be always upon some special case." The rule thus laid down has always been recognised. *Consett* v. *Bell* (3), on which the Vice-Chancellor relied in the Court below,

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The Vice-Chancellor of *England* overruled this objection, although there was neither collusion, nor insolvency, nor any refusal to sue on the part of the executors, and decreed *Wilson* to refund the money. That case appears to me to be a conclusive authority against the objection to the frame of this suit. The rule now appears to be, subject to the exceptions of cases of collusion, of insolvency of the personal representatives, of refusal by them to sue, whether collusively or *bonâ fide*, or of the existence of what has been rather vaguely termed 'special circumstances.' The last exception seems to comprehend, and to be confined to, cases in which, from the nature of the assets or the position of the personal representative, it would be either impossible, or, at least, seriously inconvenient, for the representatives to take proceedings. In the present case I am of opinion that, after what has occurred, there would be very great difficulty in the way of the executor with respect to, at least, that portion of the bill which seeks repayment of the moneys already paid, and that his conduct, though not amounting to an actual refusal, affords evidence of an unwillingness to embark in so serious a litigation, sufficient to justify the Plaintiff in filing his bill against him and the other Defendants. On these grounds, and on the authority of *Consett* v. *Bell*, in the principle of which I concur, I shall overrule the objection to the frame of the suit."

7 Ch. D. 215

(1) 2 Eq. Cas. Abr. 253; see also *Franklin* v. *Fern*, 2 Eq. Cas. Ab. 254; Barnard. Ch. Rep. 32.

(2) 6 Ves. 748.

(3) 1 Y. & C. C. C. 569; 11 L. J. (N.S.) Ch. 401.

does not impeach it, but proceeds on the peculiar circumstances which existed there, and, therefore, must be taken as being in accordance with it. That was a case where the executors themselves had acted wrongfully, or at least imprudently, by paying over to a supposed donee of property, money to which he was not, in reality, lawfully entitled; and there, of course, they came within the rule as to special circumstances, and the bill made them parties in respect of their wrongful acts. And no doubt they were in that respect proper parties. But besides that, the suit there was an administration suit. It is not so here. In *Stainton* v. *Carron Company* (1) the Master of the Rolls distinguished the case on the very ground of the acts of the executors, and adopting Lord Justice *Turner's* opinion in *Travis* v. *Milne* (2), said: "I think the cases may be summed up thus: that the person interested in the estates of the testator, not being the legal personal representatives, will not be allowed to sue persons possessed of assets belonging to the testator unless it is satisfactorily made out that there exist assets which might be recovered, and which, but for such suit, would be lost to the estate;" and, as that was not there made out, he allowed a demurrer to the bill. In *Saunders* v. *Druce* (3) the same principle was recognised, Vice-Chancellor *Kindersley* expressly declaring that only the executors can sue a debtor to the testator's estate.

The rule of proceeding in Equity must therefore be taken to be completely established, and this suit must fail. No collusion, no insolvency, nor refusal to sue is proved, nor is this an administration suit. This suit is improperly framed, and yet the Court of Appeal, taking no notice of this objection, has affirmed the order for the deed to be delivered up to the solicitor of the Plaintiff to be cancelled—that Plaintiff not being the proper person to sue, and not having complied with the statutory directions.

The charges of actual fraud not being supported by any evidence whatever the bill ought to have been wholly dismissed.

Mr. *Pearson*, Q.C., and Mr. *Graham Hastings*, as to the argument relating to the frame of the suit, said that it was maintain-

(1) 18 Beav. 146, 157. (2) 9 Hare, 141; 20 L. J. (N.S.) Ch. 665.
18 Jur. 139. (3) 3 Drew. 140–155.

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able in its present form according to the authority of *Bowsher* v. *Watkins* (1), but they also insisted that the objections, though argued in the Vice-Chancellor's Court, had been abandoned in the Court of Appeal, and could not now be put forward.

It was not admitted by the Appellant's counsel that the objections had been abandoned.

The LORD CHANCELLOR intimated that the House would communicate with the Judges of the Court of Appeal on the matter, and ascertain exactly what had taken place.

The hearing was adjourned for that purpose.

1874
April 27.

THE LORD CHANCELLOR (Lord *Cairns*):—

We have now received a communication from the learned Judges of the Court of Appeal in *Ireland* stating that they are quite satisfied that the objection urged at the Bar here upon the subject of the will of the testator having been proved, was not taken or insisted upon in the Court of Appeal in *Ireland*. The statement made to this House was that Mr. *Butt*, the leading counsel for the Appellant before the Court of Appeal in *Ireland*, being very much pressed for time, and being desirous to be away to attend another case, opened the case more shortly than he otherwise would have done, and so did not argue the point; but that his junior, Mr. *Hemphill*, desired to argue this point. Lord Justice *Christian* states that Mr. *Butt* opened the case during the whole of two days, and that on the morning of the third he desired to supplement what he had said by certain farther observations and by citing some authorities. Lord Justice *Christian* has a most careful note of every point that was urged, and of every authority that was cited, and he says that this question was not alluded to in any way. And the Lord Chancellor concurs in that.

I ought to add that a statement having been handed in to us by both sides, with a view to its being transmitted to *Ireland*, of

(1) 1 Russ. & My. 277.

what passed according to the recollection of each side, the statement handed in by the Appellant's solicitor contained this passage, "According to the practice of the Appeal Court in *Ireland*, the course is to hear only one of the Appellant's counsel in opening the case and one junior only in reply; and so Mr. *Hemphill* was not heard until the reply, when he proposed to argue the point in question. Upon his proceeding to do so he was stopped by the Court." The recollection of the learned Judges does not tally with the statement that it was proposed to argue this point even in reply. But possibly, if that statement had been before the House on the former occasion it might have obviated the necessity of consulting the learned Judges at all. Certainly I understood that what was alleged to have occurred was this, that the junior counsel, following his leader and as part of the opening, proposed to argue the point; but since it appears that it is the custom in *Ireland* that the junior is only heard in reply, it appears to be admitted that at the opening of the case there was no reference whatever made to this point. I ought to add that Lord Justice *Christian* says that if the point had been mentioned it would, in his opinion, have been a matter of course that the Court would have ordered the case to stand over in order that the formal defect of proof might be supplied.

Mr. *Higgins*:—It will now be a matter for your Lordships' consideration, taking that statement as putting the House in possession of all that took place before the Court of Appeal in *Ireland*, whether your Lordship would nevertheless think that, as we are appealing from a decree by the learned Vice-Chancellor, confirmed by the Court of Appeal, it is not open to us now, notwithstanding the forgetfulness of counsel in the Court of Appeal below, to take the point.

THE LORD CHANCELLOR:—No; that is quite settled by what passed on the former occasion—we only wished to know what actually passed in the Court below. I am bound to say, so far as I have heard the case at present, it appears to me that this was an an objection technical in the highest degree, and that there never was, at any point of the litigation that I have observed, any

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substantial idea on the part of your client that the capacity of the testator to make the will could be challenged.

The case was then fully heard on the merits.

1874
May 15.

THE LORD CHANCELLOR (Lord *Cairns*):—

My Lords, in this case it would be proper that I should in the first instance remind your Lordships of a preliminary objection as to the suit, which was taken when the appeal was first opened, and of the grounds upon which your Lordships, notwithstanding that objection, required the appeal to proceed, and heard it upon its merits. My Lords, the nature of that objection was this, the bill in this case is filed by one *Luke Eiffe*, who is the residuary devisee and legatee under the will of *John Norton*, dated the 28th of January, 1867, to set aside a deed of the 19th of February, 1864, by which *Norton* charged his real estate with an annuity of £100, and entered into a covenant binding his personal estate. When the bill was filed there were two principal Defendants, the one, *O'Brien Hilliard*, who was an infant under the age of twenty-one years, and the other, *Osborne Hilliard*, his father. *O'Brien Hilliard*, the infant, died on the 29th of January, 1869, before the appeal in the Court of Chancery in *Ireland* came on to be heard, and he died before he attained the age of twenty-one years. The Plaintiff in the suit, *Eiffe*, filling the double character of both devisee and legatee, there could be no question as to his right to sue, while if, on the other hand, he was only legatee, a question might arise whether the suit, which would then be limited to personalty only, should not have been instituted by the executor, who, in place of instituting the suit as Plaintiff, was here made a Defendant. The Plaintiff produced in the ordinary way the probate of the will of the testator, but he did not prove the will *per testes*, or give that notice under the recent statute which, if not answered by the other side, would have made the probate of the will evidence with regard to the real estate passing under it.

In that state of things, the case came before the Vice-Chancellor of *Ireland*. It was heard, and in his judgment on this question as to the frame of the suit your Lordships will remember he states:—"A question has been raised by the infant Defendant

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that the present suit cannot be maintained, as the Plaintiff has not established any right to sue either as devisee or legatee, that he has shewn no title as devisee, as the will has not been proved in this cause as to real estate, and as notice has not been served under the *Probate Act* of using the probate for that purpose, that he has not alleged or proved any assent to the residuary gift to him of the personal estate, and that he has not shewn collusion or insolvency on the part of the executor, to entitle him, as legatee, to sue the infant Defendant, or his trustee, *Osborne Hilliard*. It seems a strange oversight to have omitted to prove the will as to the real estate, when the deed impeached by this suit purports to charge the annuity upon it as well as upon the personal estate. In consequence of it, I cannot regard the will as giving the Plaintiff any title to that real estate, or make any decree in his favour in respect of it, if I come to a conclusion in his favour upon the invalidity of the deed."

My Lords, I own that it appears to me that a better and safer course to have taken at the hearing of this case would have been for the Vice-Chancellor to order it at once to stand over upon this objection, so that the will might have been proved as to the real estate; and I feel some surprise, having regard to the expressions used in the judgment of the Vice-Chancellor, at the form which the decree made by His Honour afterwards assumed. That decree declared "That the deed of annuity, dated the 19th day of February, 1864, in the pleadings mentioned, is fraudulent and void, and it is ordered that the Defendant *Osborne Hilliard* do deliver up said deed of annuity to the Plaintiff's solicitor to be cancelled." Your Lordships will observe that that decree is, apparently, entirely opposed to the statement of the Vice-Chancellor, which I have just read, that he should not feel himself able, in the state of the evidence before him, to make any decree reaching the real estate.

However, my Lords, in that state of things an appeal against the decision of the Vice-Chancellor was brought before the Court of Appeal in Chancery in *Ireland*. When it came on the infant had died, and his father, succeeding to him as his heir-at-law, filled a position different from that which he had filled at the first hearing. At the first hearing he was trustee of the annuity in

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question for his son the infant. At the hearing upon the appeal, he was the person wholly interested in the subject-matter of the suit, and of course was *sui juris* to take whatever course he might think right with regard to the cause. He might, of course, have insisted upon this objection which had been taken before the Vice-Chancellor. I apprehend it is clear that if he had insisted upon the objection, the case would have stood over for a few days, and the will would have been proved in the usual manner. It became at your Lordships' Bar a matter of controversy whether the objection was or was not taken before the Court of Appeal. Under those circumstances, your Lordships had a communication made with the learned Judges of the Court of Appeal in *Ireland*, the late Lord Chancellor and Lord Justice *Christian*, and the result of that communication was a very clear expression of opinion on the part of those learned Judges that the objection had not been taken before them, and that if it had been taken, they, as a matter of course, would have given an opportunity for the formal proof of the will.

Now, my Lords, this objection attempted to be raised at your Lordships' Bar appeared to me, and certainly I think it appeared also to your Lordships, to be an objection purely of form and not of substance. I say that for this reason; the will of the testator was dated the 28th of January, 1867, and there was a codicil to the will dated the 2nd of February, 1867, the day of the testator's death. Among the witnesses called in the case and examined were one of the two attesting witnesses of the will and both of the attesting witnesses of the codicil. The attesting witnesses were persons of station and respectability; they were a stipendiary magistrate, a physician, the householder of the house in which the testator lived, and the fourth, I think, appears to have been a churchwarden of the parish. The three who were called were called for other purposes connected with the merits of the case, but no question whatever was asked of them with regard to the will or the competency of the testator. As to the *factum* of the will, that was assumed on both sides. As to the competency of the testator, the Appellant of course vouches for the competency of the testator in the year 1864, when the deed in question was executed. And I observe also, that in his answer he entirely

vouches for the competency of the testator on the 25th of January, 1867, that is to say, three days before the will was made; because he relies upon a letter of the testator written on that day, of which letter he speaks as expressing the mind and purpose of the testator at that time. Under those circumstances I think your Lordships will be of opinion, as indeed you were of opinion during the argument, that the objection was one of the merest form. And when you find that the Appellant, the *dominus litis*, as far as his defence was concerned before the Court of Appeal in Ireland, had it in his power to take this objection, which had been present to the mind of his counsel in the primary Court, but which failed to be taken or insisted upon in the Court of appeal, I think your Lordships would, under any circumstances, be loth to allow such an objection to prevail upon the hearing of the appeal before your Lordships. And being of that opinion, your Lordships considered that the appeal should proceed and be heard upon the merits.

My Lords, I have gone into this detail lest it should appear that your Lordships had not given full consideration to the objection which was taken, and had not carefully examined into it; because I own that, *primâ facie*, until this explanation was given of the circumstances of the case, it would appear that a very great oversight had been committed in the first instance in the Court of Chancery in *Ireland* in not requiring the ordinary proof of the will to be given.

My Lords, I now come to the substance of the case:—[His Lordship then went into all the details of the case, and, declaring his opinion that certain statements in the bill affecting the conduct of the *Hilliard* family ought never to have been made, he added that he thought the deed of annuity had been obtained under circumstances of influence and of irregularity that rendered it impossible for the Court to maintain it, and therefore he moved that "the appeal be dismissed with costs."]

LORD CHELMSFORD:—

This case, as originally presented to the Court, was full of charges of gross fraud committed by Mr. *Osborne Hilliard*. These having been either not proved or disproved, so much of the bill as contained these unfounded charges was very properly dismissed with

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costs. The Appellant has argued before your Lordships that these parts of the bill having been struck out, nothing remains in the way of allegation in the bill which will serve as the foundation for the decree pronouncing the deed of annuity to be fraudulent and void. But it appears to me that there is quite sufficient left in the bill to raise the two questions which are to be determined by your Lordships. These questions are those which relate to the making of the annuity deed, and to the consequent validity or invalidity of that instrument. [On these questions his Lordship went minutely through the evidence, and expressed his full concurrence with the decision of the Court of Chancery in *Ireland,* that the annuity deed was invalid.]

LORD HATHERLEY :—

My Lords, after the very full analysis this case has received from my noble and learned friends, I have scarcely a word to add, beyond expressing my concurrence in the opinion of the noble and learned Lords who have preceded me.

I think it due to the Appellant in this case to express my concurrence especially in the observations which were made by my noble and learned friend beside me (Lord *Chelmsford)* at the commencement of his address to the House, namely, in the expression of regret that numerous charges of a very improper character should have been inserted in the bill which the Respondent filed in this cause. They have been very properly struck out, and relief has been denied in respect of any of those charges, inasmuch as they were not proved, and in some cases they were positively disproved. And I am very glad that, at the hearing of this appeal at the Bar of this House, Mr. *Pearson* very properly, on the part of his clients, expressed their regret that those charges had ever been inserted in the bill. But, my Lords, at this period of the day I will not pursue that point farther. It is, however, idle to pretend that by the introduction of those charges the case was brought within the rule in *Harrison* v. *Guest* (1). There remains,

(1) 8 H. L. C. 481. See *Archbold* v. *The Commissioners of Bequests for Ireland,* 2 H. L. C. 440, 460, where, because fraud was alleged but not proved, and without those charges of fraud the bill did not present matter sufficient to call for the interference of the Court, it was dismissed.

unfortunately, quite sufficient to compel your Lordships' House to say that it is impossible that this deed can stand:—[His Lordship here stated the circumstances which led him to that conclusion, and expressed his full concurrence with the judgment which had been proposed to the House.]

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LORD SELBORNE entirely concurred.

Decree and Order affirmed and appeal dismissed with costs.

Lords' Journals, 27th April, 1874.

Solicitor for the Appellant: *E. T. Lewis.*
Solicitors for the Respondent: *Woodrooffe & Plaskett.*

ROWLAND BURRARD COOPER, THE REV. R. L. DASHWOOD, AND EDITH THERESA HIS WIFE . . . . . } APPELLANTS;

AND

WILLIAM HENRY COOPER . . . . . RESPONDENT.

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April 30;
May 1, 4.

Deed—Will—Election—Married Woman—Next of Kin—Practice.

The rule of the *Statute of Distributions* which requires the conversion of an intestate's estate into money, is introduced simply for the benefit of creditors, and the facility of division among the next of kin. But, as regards the substantial title to property, the right of the next of kin (subject only to the claims of creditors) is complete.

A residuary legatee under a will has a clear and tangible interest in the residue, and the *Statute of Distributions* being nothing but a will made by the Legislature for an intestate, his next of kin stand, with regard to his personal estate, in the same condition as does a residuary legatee under a will:

Both may therefore be subject to the rule of election.

In these respects a creditor does not resemble either.

A married woman cannot declare an election. An inquiry was therefore directed in the case of a married woman (one of two next of kin required to elect) for the purpose of ascertaining whether it was for her benefit and the benefit of her children to take under or against a will.

A. gave a certain estate, *P. H.* (together with personal property), to trustees on trust, after his widow's death, to sell, and hold the proceeds, with his other property, in trust for any one of his children in such form and

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manner as his widow, before a certain fixed period, should appoint. *A.* died, leaving three sons, *W. H.*, *R. E.*, and *F. J.* Before the expiration of the fixed period the widow executed a deed by which, after disposing of other property, she directed the proceeds of *P. H.* to be divided equally among the three sons. The deed reserved to her a power of revocation. She afterwards, believing that she still possessed power to dispose of the estate, made a will, by which she gave this estate of *P. H.* to *W. H.*, the eldest son, and then, by different successive codicils, gave benefits to the other two sons, and a special legacy to each of the two children of *R. E.* (the only one of the three sons of the original testator who had married). *R. E.* died before his mother, and died intestate. On her death a suit was instituted, in which it was declared that, so far as the estate of *P. H.* was concerned, her will (which could only speak from the date of her death, and therefore long after the expiration of the period fixed for the making of the appointment) was inoperative. *W. H.* then filed a bill to compel the two children of *R. E.*, and also his youngest brother, *F. J.*, to elect between their claims under the deed of appointment and under the will and codicils. *F. J.* submitted; the two children of *R. E.* resisted:—

Held, that their rights under the deed of appointment, though derived through their father, were exactly the same as were those of *F. J.*, and that they were bound to elect:

Held, also, that the special legacies to the two children of *R. E.*, though given to them by name, and given before his death, must be taken into account together with the interest which they derived through him as his next of kin, the whole of the benefits to be taken under the two titles being subject to election.

A special direction was inserted in the order of the House as to the mode of taking the account with reference to the administration of the estate of *R. E.*

THIS was an appeal against a decision of the Lords Justices (1), by which a previous decision of Vice-Chancellor *Stuart* (2) had been reversed.

Mr. *W. H. Cooper* was possessed, together with much other property, of an estate called *Pain's Hill*, near *Cobham*, in *Surrey*. He had three sons, *William Henry*, *Rowland Edward*, and *Frederick John*. By his will, dated the 30th of May, 1840, he gave his estate called *Pain's Hill* to trustees in trust to pay the rents, &c., to his widow for her life, and after her death to sell the same, and hold the proceeds, together with the proceeds of his other property, as his personal estate, in trust for any one or more of his children, grandchildren, &c., in such form and manner and in such proportions as his widow, "at any time or times, and from

(1) Law Rep. 6 Ch. Ap. 15. (2) Law Rep. 6 Ch. Ap. 16, n.

time to time, before each and every of my said children shall have attained the age of twenty-five years, by any deed, &c., in writing, shall, either absolutely, or with powers of revocation and new appointment, direct, limit, or appoint." The testator died in September, 1840. His eldest son *William Henry* became twenty-one in November, 1840; his second son *Rowland Edward* in July, 1845; and his third son *Frederick John* in October, 1847.

On the 5th of April, 1841 (and therefore before any of the sons had attained twenty-five), Mrs. *Cooper*, the widow, executed a deed of appointment, which recited that her husband had created certain trusts of *Pain's Hill* estate for her benefit, and had given it "subject thereto to go along with the residue of his real and personal estates, property, and effects," and that the trustees were to invest the proceeds subject to any appointment she might, before every of the testator's children had attained twenty-five, make, by any deed in writing, absolutely or with power of revocation. She then, after providing certain specific sums for investment for her three sons, gave the residue (which included the proceeds of the *Pain's Hill* estate) in trust for all the three sons equally to be divided among them, their executors, administrators, &c.; she then reserved to herself a power of revocation.

On the 10th of April, 1841, Mrs. *Cooper* made a will, by which, treating herself as still having complete disposing power over *Pain's Hill* estate, she gave it by name to her eldest son *William Henry*, absolutely. She afterwards made several codicils, varying some of the dispositions she had made of different portions of the property.

In July, 1845, *Rowland Edward*, the second son, married, and by this marriage he had two children, *Rowland Burrard*, born in July, 1846, and *Edith Theresa*, born in January, 1848. His wife died in February, 1849. He himself died in September, 1858, intestate, his mother, Mrs. *Harriet Cooper*, being still alive.

By a codicil dated the 1st of December, 1852, the testatrix confirmed her will so far as the gift of the estate of *Pain's Hill* to her eldest son *William Henry Cooper* was concerned, but in all other respects revoked her will. And in the same codicil, after many other bequests, she gave to the trustees the sum of £1000 upon trust to invest the same as therein mentioned, and to apply the

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income thereof towards the maintenance and education of her grandson *Rowland Burrard Cooper* (whether his father should or should not be of ability to maintain him) until he should attain twenty-one, and then transfer the principal to him. In case he should die under twenty-one the income was to be applied in like manner towards the education and maintenance of her granddaughter *Edith Theresa Cooper* (now *Dashwood,* one of the Appellants) till twenty-one or marriage, and then to be transferred to her for her sole and separate use. She then gave a farther sum of £1000 in exactly the same terms for the education and maintenance of *Edith Theresa Cooper,* with the like directions in case of her death for transfer to the use of *Rowland Burrard Cooper.*

She made four other codicils, by one of which (made after the death of her son *Rowland Edward*) she recited that by a previous codicil she had given her real estate in thirds to her three sons, she revoked the devise of one-third to *Rowland Edward* and devised two equal third parts of the same share of her real and residuary personal estate equally between his two children (the present Appellants), and the remaining third equally between her own two sons *William Henry* and *Frederick John.*

Mrs. *Harriet Cooper* died in May, 1863, and disputes arising as to the effect of the deed of appointment, and of the will, and the various codicils of Mrs. *Harriet Cooper,* under all of which interests could be claimed by her children and grandchildren, a bill was filed in September, 1863, and the cause was heard before Vice-Chancellor *Stuart,* whose decision was taken by appeal before the Lords Justices, who, in November, 1867, pronounced a decree (1) to the effect that the will not having come into operation until the death of the testatrix, and therefore after the prescribed period during which she had power to appoint, could not take effect as a new appointment under the power, and that the proceeds of the sale of *Pain's Hill* belonged in thirds under the deed of the 5th of April, 1841, to *William Henry,* to the next of kin of *Rowland Edward* and to *Frederick John.*

William Henry then filed this bill to put the Appellants, *Rowland Burrard Cooper* and *Edith Theresa* (now the wife of the Rev. *R. L. Dashwood*) the children of *Rowland Edward,* and also *Frede-*

(1) *Cooper* v. *Martin,* Law Rep. 3 Ch. Ap. 47.

rick John the youngest son of the testator, to their election. Vice-Chancellor *Stuart* decided that there was no case of election. The Lords Justices reversed that decision (1), and this appeal was then brought.

Mr. *Dickinson*, Q.C., and Mr. *Fry*, Q.C. (Mr. *T. Rawlinson* was with them), for the Appellants, the children of *Rowland Edward Cooper* and Mrs. *Dashwood* :—

There was no case of election here. It was the intention of the testator to convert his real into personal estate, and the interest of the children of the testator was therefore an interest to take such part of his personal estate as, apportioned to each, might remain after payment of his debts and legacies. The right of each child was by the deed of appointment limited to a third. One of these children married, had two children, the present Appellants, and then died intestate. These two children are his next of kin. The interest of a next of kin in the personal estate of an intestate is an undefined and intangible interest, it is a right merely to have the estate converted into money, in that respect resembling that of a residuary legatee, as to whom, in *Lady Cavan* v. *Pulteney* (2), it is said that "a residuary legatee is entitled only to what remains after the debts are discharged," it is not something definite and ascertained which can be set against a clear gift of a specific benefit under a will. It is not, therefore, the subject of election, else a creditor of the intestate, entitled to be satisfied out of what should come to the intestate under a gift of personalty, might be put to his election; which could never be permitted.

Here, too, the deed of appointment and the will were not brought into direct conflict, for in the case of *Cooper* v. *Martin* (3) it had been decided that, so far as respected the part of the testator's property dealt with by the deed of appointment, the will was inoperative. The two instruments, therefore, had no direct relation to each other, one was valid the other invalid, and consequently no election could be called for as between them. The invalid appointment under the will of the testatrix must stand by itself—

(1) Law Rep. 6 Ch. Ap. 15. (2) 2 Ves. Jun. 544.
(3) Law Rep. 3 Ch. Ap. 47.

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or fall by itself; it had fallen, for it had been declared inoperative, and it cannot therefore affect other gifts by a different instrument which are valid. A Court of Equity will not compel a legatee lawfully entitled to take other benefits, even under one and the same instrument, where the gift of those other benefits is perfectly valid, to give effect to an invalid appointment and so abandon the other gifts which are perfectly valid: *Churchill* v. *Churchill* (1). And no person is bound to elect without a clear knowledge of the funds between the acceptance of which he is to choose: *Whistler* v. *Webster* (2); nor does any rule as to election arise, except as between a gift under a will, and a claim *dehors* the will and adverse to it: *Wollaston* v. *King* (3); which supposes valid instruments, a deed and a will, to be in opposition to each other. There is none such here, for the will has already been declared to be inoperative as to that part in which, dealing with the *Pain's Hill* estate, it is inconsistent with the deed.

The Appellants had interests here that never could be subject to the rule of election. Such were the gifts of the two sums, of £1000 each, given to them by one of the codicils. These were absolute gifts, entirely within the power of the testatrix to make; totally independent of any rights possessed by the Appellants' father. She had no intention that they should, in any way, be connected together; they were given by a codicil made while their father was still alive; and when, being alive, he had a vested interest in the third of the proceeds of the *Pain's Hill* estate, and they had no interest whatever in those proceeds. As to these gifts, therefore, there could be no obligation, implied or otherwise, for the Appellants to elect between them and gifts to their father which might never come into their possession.

It is not enough to say that the gifts under the deed of appointment and under the testatrix's will were inconsistent with each other. The rule of election is not necessarily to be applied to such gifts. In *Lady Cavan* v. *Pulteney* (4) a tenant in tail of certain estates, remainder in tail to *B.*, the wife of *C.*, thinking that he, the tenant in tail, had the fee, made leases exceeding his power. By will he devised these estates (with others) to

(1) Law Rep. 5 Eq. 44–50.
(2) 2 Ves. Jun. 371.
(3) Law Rep. 8 Eq. 165.
(4) 2 Ves. Jun. 544.

B. for life, remainder to *D.*, and he gave to *C.* certain interests in his personal estate, and the residue to *D.* After his death, *D.* filed a bill to have the will established. *B.* elected to take her estate tail in opposition to the will. After her death, *C.*, her husband, who had received certain benefits under the will, claimed to take her estate as tenant by the curtesy, and brought ejectments against the lessees. It was held that the lessees were not entitled to stop the ejectments, nor was *D.* entitled to put *C.* to his election. This decision was adhered to after farther consideration (1). And even when one of two benefits is given to a particular person by the same instrument it does not follow that he will be put to his election, or even be allowed the power to elect; the person to confer the benefit may be the person to decide what shall be done: *Wilson* v. *Wilson* (2); so that the creation of two inconsistent advantages does not necessarily bring with it the obligation to elect.

Here, too, no case of election arises, for the share of the proceeds of *Pain's Hill* estate is not given to the Appellants, it was given to their father—they can only claim under a derivative title, which is not properly the subject of election.

In *Grissell* v. *Swinhoe* (3) a testator being entitled under a settlement, subject to a life interest, to a moiety of a fund, by his will recited that he was under the settlement, "subject to the trusts therein contained," entitled to the whole fund, and he purported to bequeath the whole, and gave one moiety to the husband of a lady really entitled to it in her own right, and the other moiety to the husband of his own daughter. On the death of the former lady her husband claimed the moiety which properly belonged to her, and one half of the other moiety under the will, and it was held that he was not bound to elect, for that his claim to the first moiety was as representative of his wife, and consequently was founded on a derivative title. That case was quoted in argument upon the present case in the Court below (4), but Lord Justice *James* treated it as distinguishable on the ground that there "the legatee's title did not exist at the death, but was a

(1) 3 Ves. Jun. 384.
(2) 1 Dr. & Sm. 152; 19 L. J. (Ch.) 279.
(3) Law Rep. 7 Eq. 291.
(4) Law Rep. 6 Ch. Ap. 19-21.

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derivative title through the title of another person who was the true owner at the death." The distinction cannot be sustained, for here the title was a derivative title, and was so at the time of the death.

There is no doubt as to the general principle, that the same person cannot take under a will and against it, and therefore no question is raised upon those cases where that principle has been declared. But this case does not fall within their operation.

There was not here any intention on the part of the testator to impose an obligation to elect, and without it a case of election on a testamentary instrument does not arise: *Dillon* v. *Parker* (1); *Crosbie* v. *Murray* (2).

The form of the decree is erroneous in the direction given as to taking the accounts (3).

Mr. *Greene*, Q.C., and Mr. *Bristowe*, Q.C. (Mr. *Kekewich* was with them), for the Respondents:—

This is a case in which the rule of election necessarily arises: *Noys* v. *Mordaunt* (4); *Streatfield* v. *Streatfield* (5). There must

(1) 1 Swanst. 359, and notes; 1 Cl. & F. 303.

(2) 1 Ves. Jun. 555.

(3) The decree, after referring to and adopting the orders made in the case of *Cooper* v. *Martin*, in the matter of the *Pain's Hill* estate, and the proceeds of the sale thereof, went on thus:—"And that the Defendants, *Rowland Burrard Cooper*, and *Robert Lawes Dashwood*, and *Edith Theresa* his wife, are bound to elect between the benefits conferred on them by the will and codicils of the testatrix, *Harriet Cooper*, on the one hand, and the respective shares of the Defendants, *R. B. Cooper* and *E. T. Dashwood*, as two of the next of kin of *R. E. Cooper* deceased, or so much of the clear residuary personal estate of the said *R. E. Cooper* as represents those parts of the proceeds of the sale of the *Pain's Hill* estate which were appointed to him by the deed-poll of the 5th day of April, 1841, on the other hand. And their Lordships do order that for the purposes of such election to be made by the Defendants, *R. B. Cooper* and *E. T. Dashwood*, the clear residuary personal estate of *R. E. Cooper* be considered as it was at the death of the said testatrix, *Harriet Cooper*. And in ascertaining the aforesaid clear shares therein of the said Defendants, *R. B. Cooper* and *E. T. Dashwood*, the debts and funeral expenses of the said *R. E. Cooper*, and the expenses of administering to his estate not discharged at the death of the said *Harriet Cooper*, the testatrix, are to be treated as apportioned rateably between those parts of the proceeds of the sale of the *Pain's Hill* estate so appointed as aforesaid and the rest of his general personal estate in proportion to their respective shares or amounts." The costs were ordered to be paid out of the estate of the testatrix.

(4) 2 Vern. 581.

(5) Cas. t. Talb. 176.

be something given instead of what is intended to be taken away; and there must be something taken away before that which is given can be appropriated. This case meets both branches of the proposition, and exhibits an instance of the existence of circumstances which really constitute the power to impose on some party the necessity of undergoing a sacrifice, and on another that of making an election. The principles governing cases in which election must be made were stated in *Thelluson* v. *Woodford* (1), and they are adopted and enforced by Lord *Redesdale* in *Moore* v. *Butler* (2), and *Birmingham* v. *Kirwan* (3), and they have never been disputed. Here the property given by the deed was fully and completely given, the right of the testatrix to dispose of it had, by mere lapse of time, been lost. The subsequent attempt by her to dispose of it, in a different manner, when her power was at an end, was an attempt to dispose of property over which she had no disposing right or power. The necessity of election was, therefore, by her acts imposed on those she intended to benefit. The two instruments were not consistent with each other, and the persons who claimed benefits under both became, therefore, liable to elect which of the two sets of benefits they would prefer to take. This necessity of election has been enforced in Courts of Equity as the means of fairly arranging the inconsistent interests of parties who, by the error or the wilfulness of a testator, are placed in a position where to give a double benefit to one would be to work an injustice to the other. Not only may a person to whom benefits are given by different instruments emanating from the same donor be compelled to elect, but a person may enter into a covenant which, upon certain events happening, will compel him to elect between what he possesses and what he may acquire. Thus, where a young lady on her marriage (being then only a minor) executed a settlement as to certain property which she then possessed, and also entered into a covenant to settle after-acquired property, and long after her marriage became possessed, by bequest, of other property for her separate use, she was held bound to bring the after-acquired property into settlement, or to make compensation for particular benefits given to her by the settlement: *Willoughby* v. *Middleton* (4).

(1) 13 Ves. 220.
(2) 2 Sch. & Lef. 242–267.
(3) 2 Sch. & Lef. 444–449.
(4) 2 J. & H. 344; 31 L. J. (Ch.) 683.

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The interest of the Respondents, in respect of their claim as next of kin of their father, to share in the proceeds of the sale of *Pain's Hill* estate is a clear, definite, and tangible interest. It is not properly described as a contingent interest coming to the next of kin only after other interests and other rights have been satisfied, and dependent therefore on them. The title to it vested in them absolutely on the death of their father, though the profitable enjoyment of it might be postponed. It came to them by operation of law as directly and distinctly as it could have come under the plain and absolute words of a will. They stood in the same situation as residuary legatees, and as these may, in fact, gain nothing, because debts may absorb the whole estate; so next of kin may equally and from the same cause obtain no benefit. But their legal title to the property is the same. Their case, therefore, does in no way resemble that of creditors, who have no distinct title to the property, but have only a right to be paid out of it. It follows, therefore, that though a creditor cannot be put to election, the next of kin may; and in this case they must elect to take as next of kin of the intestate under the deed, or to take in preference the benefits which they may expect under the will of the testatrix.

The Appellants are not relieved from the necessity of electing because their title to a share of *Pain's Hill* estate is derivative through their father; it was not derivative at the death of the testatrix, it had become vested in them upon the death of their father. Upon that event they stood exactly in his position, exactly in the position in which their uncle *Frederick John* stood, and stands, and the same principle which obliges him to elect, applies equally to them.

They are bound to bring the two legacies into account, for those legacies are benefits given under the will, which is inconsistent with the deed, and they are bound to elect between the whole of their benefits under the two titles. What was the intention of the testatrix is, upon this subject, of no importance whatever.

Mr. *Dickinson* replied.

THE LORD CHANCELLOR (Lord *Cairns*), after fully stating the facts of the case, said:—

My Lords, in that state of things, the testatrix not owning

Pain's Hill, and having no disposing power over it, her attempt to dispose of it by her will clearly would raise a case of election against any person who, taking under her will, might be found to have an interest in the *Pain's Hill* estate. And before I examine the effect which that principle would have upon the Appellants in this case, I would take the liberty of reminding your Lordships of two expressions of the general rule of the Court on this subject, the one contained in the case of *Streatfield* v. *Streatfield* (1), and expressed by Lord *Talbot*, and the other in the case of *Noys* v. *Mordaunt* (2), expressed by Lord Keeper *Cowper*. Lord *Talbot* says (3): "When a man takes upon him to devise what he had no power over, upon a supposition that his will will be acquiesced under, this Court compels the devisee, if he will take advantage of the will, to take entirely, but not partially, under it, as was done in *Noys* v. *Mordaunt*, there being a tacit condition annexed to all devises of this nature, that the devisee do not disturb the disposition which the devisor hath made;" and Lord Keeper *Cowper* says (4), in the earlier case of *Noys* v. *Mordaunt*, "In all cases of this kind, where a man is disposing of his estate amongst his children, and gives to one fee simple lands, and to another lands entailed or under settlement, it is upon an implied condition that each party acquit and release the other."

Now, my Lords, in addition to what I have already said, I should remind your Lordships that at the time when the will of this testatrix was made all the sons were alive. At the time the principal codicil was made *Rowland Edward* had died, and died, as I have already said, intestate, and by that codicil large pecuniary benefits were given to the Appellants in this case. Large benefits were also given to *Frederick John Cooper*, the youngest son of the testator. As regards, therefore, the persons interested in the proceeds of the sale of the *Pain's Hill* estate, your Lordships will observe that the eldest son would take *Pain's Hill* by the will, and would take one-third of the proceeds of *Pain's Hill* under the appointment. As to him, therefore, no question with regard to election would be material. As regards the youngest son, he would take one-third of the proceeds of the

(1) Cas. t. Talb. 176.
(2) 2 Vern. 581.
(3) Cas. t. Talb. 182–3.
(4) 2 Vern. 582.

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Pain's Hill estate under the appointment by deed, and he would take pecuniary benefits, which need not be specified, under the will. As to him, in the suit in which the present decree was made a case of election was, under the circumstances, insisted upon by the bill. Effect was given to that case of election by the decree, and from that decree, as to him, there is no appeal. And, my Lords, in truth I apprehend there could be no appeal. In point of form, no doubt, what he was entitled to by the appointment was one-third of the proceeds of the sale of *Pain's Hill*, and not one-third of *Pain's Hill* in specie; but that I think your Lordships will consider to be mere matter of form. In point of substance, and in truth, whether he took the land as land, or took it in the shape of money arising from the sale of the land, is utterly immaterial. In the eye of the Court of Equity he was, in substance, the owner of one-third of the *Pain's Hill* estate, and, as such, he was clearly bound to elect between that right under the appointment and the benefits given by the will.

That, my Lords, brings us to the remaining third of the *Pain's Hill* estate. The second son had died intestate—the one-third to which, had he lived, he would have been entitled, was part of his estate as an intestate. The case may be considered as if there had only been one next of kin, for the circumstance that we have here to deal with two out of four persons taking the intestate's estate (1), is entirely immaterial as to the principle. My Lords, if there had been one next of kin entitled to this one-third of the proceeds of the sale of the *Pain's Hill* estate, subject only to the payment of the debts and the administration expenses of the intestate, I apprehend that your Lordships would have no difficulty in arriving at the conclusion that just as the third son was, in substance, the owner of one-third of the *Pain's Hill* estate, so in substance, this sole next of kin of the second son was the owner of the remaining third, subject only to the payment of the debts and expenses.

My Lords, it was very much pressed on your Lordships, in the extremely able argument we heard at the Bar from the Counsel for the Appellants, that the interests of a next of kin in the estate

(1) *Rowland Edward*, the second son, had married a second time, and left his wife and one child him surviving. But they were not parties to this suit.

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of an intestate is an undefined and intangible interest, that it is a right merely to have the estate converted into money and to receive a payment in money after the debts and expenses are discharged. My Lords, no doubt the right of a next of kin is a right which can only be asserted by calling upon the administrator to perform his duty, and the performance of the duty of the administrator may require the conversion of the estate into money for the purpose of paying debts and legacies. But I apprehend that the rule of law, or the rule laid down by the statute, which requires the conversion of an intestate's estate into money, is a rule introduced simply for the benefit of creditors and for the facility of division. For the benefit of creditors, and for the facility of division among the next of kin, the estate is to be turned into money, but as regards substantial proprietorship the right of the next of kin remains clear to every item forming the personal estate of the intestate, subject only to those paramount claims of creditors.

My Lords, this right of the next of kin I find extremely well expressed in a book, which, on this subject, is a book of high authority—*Bacon's* Abridgment—in the part of it which treats of executors and administrators. Speaking of the right of the next of kin, and of the statute regulating the succession to an intestate's estate, it says on the clause of the statute which directs that no distribution shall be within a year after the death of the intestate (1): "It hath been adjudged that if a person entitled to a distributive share dies within the year, yet it is such an estate vested in him as shall go to his executor or administrator, for the statute doth not make any suspension, or condition precedent to the interest of the parties, but it is a clause merely for the benefit of creditors; also this statute, being in nature of a will for all persons who die intestate, ought in this instance to be resembled to the case of a residuary legatee, in which it is always holden, that if such a legatee die before the debts are satisfied, so that it doth not appear to how much the surplus will amount, yet the executor or administrator of such a legatee shall have the whole residue, &c., which remains over and not the executor of the first testator."

My Lords, I apprehend that really goes far to dispose of this

(1) Tit. Exors. & Admors. I. s. 4, vol. iii. p. 75.

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argument on the part of the Appellants. If we look on the *Statute of Distributions*, as I think we ought to look on it, as in substance nothing more than a will made by the Legislature for the intestate, and liken this to the case of a person having made a will and having directed his debts and expenses to be paid, and having given over his clear residue to his three children and his widow—if, I say, we look at the case as if it had assumed these features, I apprehend your Lordships will be perfectly clear that the residuary legatees under such a will had a clear and tangible interest in specie in the *Pain's Hill* estate, just in the same way as the youngest of the three brothers, *Frederick John*, who directly took one-third of the proceeds of the estate.

The Appellants contended, with great ingenuity and skill, that if this were so, your Lordships could not stop short of the conclusion of holding that if you found, at the time the succession of this testatrix opened, a creditor of the second son, who had been paid his debt, and who therefore was in possession, or who without payment of his debt, might have claimed to be put in possession, of a certain portion of the intestate's estate, in order to satisfy his claim, you would be obliged to hold, supposing he had received a benefit under the will of the testatrix, that he also would be obliged to elect between that benefit and the portion of the intestate's estate which might be required for the payment of his debt. My Lords, I apprehend the two cases are perfectly distinct; and I would suggest to your Lordships a test which will at once shew the difference between them. Can any person doubt but that one of these next of kin might, before the administration of the estate of the intestate, have released to another next of kin, or have assigned to a third party, his interest in any specific portion of the estate of the intestate, in any specific item of the estate of the intestate, subject only to that item bearing its share of the administration expenses? I apprehend it to be quite clear that a next of kin could take that course. But, my Lords, could a creditor do so? Could a creditor, before payment of his debt, say, I will release to you, or I will assign to you my interest in such an item of the estate of the intestate? Clearly a creditor could do nothing of the kind. He is a person who has no interest whatever in any specific portion of the estate of the intestate. He

has a personal claim merely for the payment of his debt, to which effect might be given, and would no doubt be given in the proper Court, by securing the assets and obtaining payment for him out of the assets.

My Lords, that disposes, I think, if your Lordships take that view, of the main question which was argued at the Bar. The two children, who are two of the next of kin of the second brother (their father), take benefits under the will:—they also take, in substance, an interest in an aliquot share of the proceeds of the sale of the *Pain's Hill* estate as next of kin of their father, and they must elect between their interest under the will and their interest which would be in opposition to the will.

But, my Lords, it was then said that at all events if they elect they must only elect between that interest which they take under the codicil to the will of the testatrix made after their father had died, and need not take into account in election a legacy of £1000 which had been given to each by the will of the testatrix made before their father died. My Lords, I can see no ground for any such distinction. It appears to me that the rule is a rule, as it was expressed by Lord *Talbot,* calling on them to elect between the whole of their benefits under the two titles under which they claim, and that no distinction is to be made founded on some supposed intention or absence of intention on the part of the testatrix when she made one or other of her two testamentary dispositions. The rule, as was said during the argument at the Bar, does not proceed either upon an expressed intention, or upon a conjecture of a presumed intention, but it proceeds on a rule of equity founded upon the highest principles of equity, and as to which the Court does not occupy itself in finding out whether the rule was present or was not present to the mind of the party making the will.

My Lords, that would exhaust the case, except that I must call your Lordships' attention to two provisions, or, rather, to one provision, of the decree, and to the absence of another provision which, as it appears to me, ought to be found there. My Lords, I do not find in the decree any direction with regard to one of the Appellants, who is a married woman, and who cannot make an election for herself. As to that, I think your Lordships will be of

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opinion that, following the ordinary course, there should be an inquiry made whether it would be for the benefit of *Edith Theresa Dashwood* and her children to take under the provisions of the will and codicils, or against the same.

Then, my Lords, the Lords Justices appear to have thought that inasmuch as before the share of the Appellants in the proceeds of the *Pain's Hill* estate could be ascertained, there must be a deduction made in respect of the debts of the intestate which might be paid out of those proceeds, those debts should be looked at as at the date of the death of the testatrix, and according as at that moment they had been paid out of one or other portion of the estate of the intestate, so the account, for the purpose of the election, should be taken. But I think your Lordships will rather be of opinion that the proper course would have been to apportion all the debts and all the administration expenses of the intestate over the whole of the assets of the intestate rateably, and in that way to find what proportion of the debts and expenses the *Pain's Hill* estate ought to have borne. If that is your Lordships' opinion, I would suggest that the decree should be varied thus: And their Lordships do order that for the purposes of such election, to be made by the Defendant, *Rowland Burrard Cooper*, and by or on behalf of the said *Edith Theresa Dashwood*, and for any purpose consequential thereon, the debts and funeral expenses of *Rowland Edward Cooper*, and the expenses of administering his estate (such expenses, if not yet ascertained, to be estimated), are to be treated as apportioned rateably between those parts of the proceeds of the sale of the *Pain's Hill* estate so appointed as aforesaid, and the rest of his general personal estate, in proportion to their respective shares or amounts. My Lords, if your Lordships adopt those alterations in the decree which I have ventured to suggest, I will also suggest to your Lordships that the main part of the decree should be affirmed, but that there should be no costs of this appeal on either side.

LORD HATHERLEY:—

My Lords, I entirely concur in the view which has been taken of this case by the noble and learned Lord on the woolsack, and he has so fully and clearly stated his view, and the law of the

Court with reference to cases of this description, that I have very few words indeed to add to what has been already said on the subject.

I apprehend, my Lords, that the difficulty which has been supposed to exist in this case arises, in a great measure, from something which has been thrown out in other cases, and, notably, in the case which was cited before us of *Lady Cavan* v. *Pulteney* (1) with reference to the non-application of the doctrine of election to what, in that case, was called a derivative interest. But, my Lords, the derivative interest in that case was simply this,—A lady having been put to her election, the question was whether her husband, who was tenant by curtesy in the estate which she elected to take, was again to be put to his election in respect of an interest which he took under the will, and which those who argued for the election said he ought not to be allowed to benefit by, unless he gave up his interest as tenant by the curtesy. I need not discuss that case. Your Lordships will see at a glance that the position of the parties was entirely different from that which we have here. We have here the simple case of certain parties in possession, by right, of a fund to which they were entitled by the will of the original testator, and also as legatees under a will of the testator's widow, which latter will affected to dispose, but could not of course effectually dispose, of the interest they possessed under her husband's will. That would, according to all the authorities, be a simple case, in which the testatrix having attempted to dispose of what was not her own, also gave benefits to the persons who, at her decease and at the opening of the testamentary document, and of the succession thereunder, are found to be both legatees under the will, and also owners of the property that she has attempted to dispose of.

Now, my Lords, although the law which has for a very long period been laid down on this subject was for a time a little open to doubt and difficulty as to the exact expression which ought to be given of the principle on which it was founded, namely, whether it should be conditional, including, therefore, forfeiture in the event of any one taking under a will endeavouring to disappoint it, or should be compensative, yet still the main principle was

(1) 2 Ves. Jun. 544.

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never disputed, that there is an obligation on him who takes a benefit under a will or other instrument to give full effect to that instrument under which he takes a benefit; and if it be found that that instrument purports to deal with something which it was beyond the power of the donor or settlor to dispose of, but to which effect can be given by the concurrence of him who receives a benefit under the same instrument, the law will impose on him who takes the benefit the obligation of carrying the instrument into full and complete force and effect.

Now, my Lords, Mr *Fry*, in the course of an ingenious argument, endeavoured to take advantage of the expression that this is "an implied obligation," to reason thus with reference especially to a portion of the benefits taken by these present Appellants under the will. He said, with respect to a portion of these benefits, namely, certain legacies of £1000, it could not possibly be implied that the testatrix had any intention that those legatees should give up any right connected with their father's interest when they took the benefit of the legacy of £1000, because at the date of the will no such right existed in them; their father was alive, he it was who was entitled to the subject-matter which is now in question in this suit with regard to election, and not they, and that the testatrix herself indicated on the face of the instrument that she was aware of his existence, and contemplated his existence subsequent to her own decease, regarding him as the person who ultimately would be found to be in possession of the property now sought to be distributed under the doctrine of election. My Lords, the fallacy of that is quite obvious. The condition, or rather obligation (which is the expression I prefer, regard being had to the dispute as to condition involving forfeiture), the equitable duty which the law imposes on a person claiming under an instrument, of giving full effect to it, as far as it would be otherwise ineffective, except through his concurrence, is simply this,—the law inquires on the death of the testator, when the will comes into operation, what is his intention, as expressed on the whole will, with reference to the disposition of that which he considers to be his property; and it being found clearly and distinctly (for it must be clearly and distinctly found) that he has expressed his intention of disposing

of what belongs to another—when once that is ascertained completely, there is nothing else which the law implies, with regard to his intention, beyond the ordinary intent implied in every man who affects by a legal instrument to dispose of property, that he intends all that he has expressed, and, among other things, that he intends to dispose of property as to which he has so expressed an intention, though it really does not belong to him. When once that intention is ascertained there is nothing else remaining to be done, with reference to election, than to see who is in possession and who is the real owner of the property; and if you find him, who is the real owner of the property at the same time taking a benefit under the will which has erroneously endeavoured to dispose of his property, then he must give effect to that intention, though founded in error, and give it full effect by either abandoning all his interest under the will, or making compensation to the extent of the value of the disappointed intention of the testator. That being the simple case, you then make no inquiry as to what may be supposed to have been the view as to those particular legacies, say the £1000, or any other specific legacy under the will, but all that you look at is this, does the person taking under the will any benefit whatsoever, of any kind or shape, possess the power of giving full effect to the will by releasing the interest he has in another subject-matter, which was not the property of the testator, but which was in terms disposed of by the will, and, finding that he has the power of so doing, you fix on him the obligation and duty of doing it.

My Lords, that clears the ground very much, I think, as to all argument with reference to the supposed intentions of the testatrix in this respect. But then comes the argument which was exceedingly ably and forcibly put by Mr. *Dickinson* in the course of the discussion of this case, namely, that that which these Appellants take is not a distinct interest, is not the thing given by the testatrix, but is simply a right to have that thing, together with the other assets of the testator, disposed of by the administrator and applied to the payment of the debts of the intestate, and when those debts are paid and satisfied, then the balance (the balance only, and not this matter in specie) comes to the person now called on to elect. I think the noble and learned Lord on the

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woolsack has so fully met and disposed of that argument, that it would be a waste of your Lordships' time for me to pursue it farther. I may be permitted, perhaps, to add another illustration (which is in truth only another way of saying the same thing) to that which the noble and learned Lord offered, namely, that,—in addition to the argument founded on the clear power of these persons interested in the testatrix's estate, to release their interest and right in this specific property, which has come to them in consequence of their rights under the will of the original testator,—there is a distinction between them and a creditor in this respect, that whereas a creditor could by no circumstance, and by no course taken by him, ever acquire a distinct interest in that particular chattel which is now in question—yet I take it that, whether it was a term of years, whether it was the produce of a sale, or whether it was any other specific chattel belonging to the intestate's estate, if there were a sole next of kin he could, by paying the debt of the intestate and satisfying the funeral and testamentary expenses, require that that property should not be sold and disposed of, and it would then become his alone, entirely and absolutely, in possession. What difference would it make if there were three or four next of kin? If they should choose to undertake the same process, and satisfy all the debts, and say that they desired to have the produce of this *Pain's Hill* estate, or whatever the specific property might be, what would there be to hinder them from taking that course and acquiring the property? No such course as that would be thought of (because it would be absurd) in the case of a creditor. A creditor would have no right to any particular chattel. All the right the creditors have is to be paid their debts out of that chattel, as well as out of other things; but their position as regards the specific property is wholly different from that of the next of kin.

My Lords, I apprehend that there is substantially no difficulty in coming to the conclusion which the noble and learned Lord on the woolsack has offered for our acceptance, and which concurs with the conclusion of the Lords Justices. My Lords, I also entirely concur with the noble and learned Lord in the view he has taken as to the alteration which is necessary to be made in the decree. I think it must have been a slip in the Court below, that the debts

of the intestate were directed to be ascertained as they existed at the death of the testatrix, and not as at the death of the intestate, because the interest taken by the next of kin is clearly an interest in every chattel that formed part of the estate of the intestate, subject to the payment, no doubt, of a proportionate part in value of the debts that existed at that time on the part of the intestate. Then, when you have found what is the interest they have, you are in a condition to ascertain what it is that they are bound to give up in case they elect to take under the will. There must also be an inquiry as to whether it will be to the interest of the married woman to elect. And as we have to make these alterations, which are material ones, in the decree, I concur in the view expressed by the noble and learned Lord on the woolsack that there should be no costs of the appeal.

LORD O'HAGAN :—

My Lords, whatever observations I might have been disposed to make upon the very able argument to which we listened at the Bar, I certainly conceive that, after the full and exhaustive treatment of the case by the noble Lords who have preceded me, I should be quite unwarranted in occupying the public time. I will only say this, that I cordially concur in the view which has been taken of this case; and I should say myself, for my own part, that, but for the division of opinion among the learned Judges in the Courts below, this case scarcely admitted of doubt or dispute.

There is, in the first place, no controversy about the facts of the case, or about the general law which is applicable to it. There is no controversy, first of all, as to the facts; and as to the general law there can be none. It has been stated very clearly by the noble and learned Lord on the woolsack. It is merely this, as expressed in various cases by various Judges, that if a person takes under an instrument he must take under the instrument altogether; if he takes a benefit he must bear the burden; if he takes a benefit from a testator, he shall to the best of his power carry out the will of that testator so far as it can be carried out. In the particular case before the House, the conditions necessitating the application of that principle are most clearly fulfilled. We have here an intention, beyond all controversy, to give a property which

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the testatrix had no right to give; and we have here an intention to give benefits to a person who had already an interest in that property. That being so, it appears to me, my Lords, that the application of the principle of election becomes perfectly inevitable.

I listened with great attention to the various suggestions that were made with great ability and power by the learned counsel for the Appellants; but they have not prevailed with me. In the first place, I do not see that there is any distinction in the position of the testatrix here upon the mere ground that she was prevented from doing that which she assumed she could do, by reason of the exhaustion of her power under the deed. Whether she had absolutely nothing to do with the property in any form, or whether she had become disabled to deal with the property in this particular form, appears to me to be quite immaterial. In the same way, it also appears to me to be quite immaterial whether the property assumed to be disposed of was realty or personalty, or whether the whole of the property was disposed of, or only an interest in it. All that has been determined so far back as the case of *Birmingham* v. *Kirwan* (1), before Lord *Redesdale*, and the other cases which have been subsequently decided are perfectly clear and conclusive upon the subject.

We had an ingenious suggestion made to us upon a very important part of the case by Mr. *Dickinson*, and that was with reference to the meaning of the expression of the Judges that the intention and meaning of the testator or testatrix must be perfectly clear; that is, quite clear and beyond all controversy. But what is the intention that the Court must apprehend upon clear evidence? Not an intention on the part of the testatrix that there shall be an election under certain circumstances. If such a thing were required the whole doctrine of election would be practically put away. A testator or a testatrix does not generally know or understand anything about the doctrine of election, and you cannot find any instrument, perhaps, in which any such an intention was expressed. The intention that must be clearly demonstrated in evidence to the Court, is an intention to do the particular thing—to give the property which the party has not a right to

(1) 2 Sch. & Lef. 444.

give, and to give a benefit to a person who has an interest in the property. Those two intentions being ascertained upon clear evidence, the law draws the conclusion. It is a conclusion of equity, and it is not necessary that there should be an intention shewn upon evidence which never could be shewn upon evidence. Having shewn as matters of fact the two intentions to which I have referred, the law draws the conclusion, and there is an end of the matter. And in this case which is now before the House, these two things are as plain as light; there is no controversy, and there could be controversy, about them at all.

One other matter, my Lords, was pressed with great power by Mr. *Dickinson*, and I think by Mr. *Fry* also, and that was with reference to the distinction between the character of specific property, and property like this, which is not specific no doubt, but only the residue to be ascertained after judicial inquiry. The noble and learned Lord upon the woolsack, together with my noble and learned friend who has last addressed the House, have made that very clear and very demonstrative indeed. If that be so I think, *cadit quæstio*. I myself ventured to put to one of the learned counsel this question: What would be the result if this, instead of being personalty, as it is said, to be disposed of after inquiry and after ascertainment of the residue, had been realty, and if there had been either a devolution upon a person as heir, or a devise of a portion to that person? The learned counsel candidly admitted that that would not be arguable. If that would not be arguable, and if there be no distinction, as I have been unable to find either in reason or in authority that there is a distinction, between a specific character of property and property which is to be made specific after inquiry, and which must therefore be assumed to be ascertained now, because it can be ascertained and ought to be ascertained according to the course of a Court of Equity, in that case the admission made by the learned counsel, if the matter be, as I think it is, clear upon the other part of the case, is, in my opinion, demonstrative of the whole matter.

It was also put as a distinction by one of the learned counsel, and pressed very much indeed upon the House, that the derivative character of the property here made a difference. I have been unable to see a distinction between the derivative character of property which comes to the heir by reason of the law just as

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much as it comes to the next of kin by reason of the law, and the derivative character of property which comes by devise. In the character of the property in this case, I see no such distinction, and I think that when the authorities are looked to it will be seen that, as in the case of *Grissell* v. *Swinhoe* (1), before the Lords Justices, and other cases to which reference has been made, the derivative character of the property regards the period at which the derivation has taken place, whether it be by heirship, or whether it be by devise, as in this particular case. If the property devolves after the death of the testator or testatrix, then the derivative character becomes material to the case. But under the circumstances of this case we have a property to be ascertained, and therefore really ascertained, for the purpose of this argument, before the death of the testatrix, and vested in these people before the death of the testatrix; and therefore this case is wholly different from the case of *Grissell* v. *Swinhoe*, that was before the learned Lords Justices, and from any other case that can be cited.

Upon this view of it, therefore, I have been unable, after giving the case the best attention in my power, to see that all those suggestions, and some others which were pressed very powerfully upon the House, do distinguish this case from the ordinary case in which you must apply the general principle of election, the conditions being fulfilled as they are fulfilled in this case. I am, therefore, my Lords, very clearly of opinion that the advice given to the House by the noble and learned Lord on the woolsack is fully founded in reason, in law, and in authority; and I also concur in thinking that the alterations which he has suggested in the decree ought to be made. I believe it is necessary for the purposes of justice that the proposed alteration should be made with respect to the debts; but under the circumstances of the case, having regard to the fact that there is certainly something difficult about it, and having regard to the conflict of opinion between the learned Judges in the Courts below, I concur also that there should not be any costs of this appeal.

LORD MONCREIFF:—

My Lords, I entirely concur in the proposed judgment, and in the reasons which have been so fully given for it, and I should

(1) Law Rep. 7 Eq. 291.

have contented myself with a simple concurrence, were it not for the very large and wide principles which have been involved in this discussion, and for the very able argument that we have heard at the Bar. I shall only, in a very few sentences, indicate the impression, upon some of the more material points, which that argument has made upon my mind.

My Lords, when Mrs. *Cooper* died, and her will came into operation, two separate rights opened to the Appellants—one, the right to claim the benefit that was provided by the will; the other the right to frustrate and disappoint the right as to *Pain's Hill* which the will also contained in favour of the Respondent,—at all events, to the extent to which he (the Respondent) had been benefited by the appointment which had been previously made. That the Appellants were so entitled to frustrate and disappoint the right of the Respondent to *Pain's Hill* I imagine does not admit of question in this case, because they had already claimed the right to do so, and had claimed it successfully in the former suit in Chancery, and, indeed, if that had not been the case, this question could not have arisen. The only question, therefore, before your Lordships is, whether they can also claim the benefit provided by the will.

My Lords, I understand the rule of law to be quite clear and fixed, that such rights are inconsistent, and that both cannot be exercised. The law will not permit a legatee to claim a legacy or a benefit under a will, and at the same time to defeat the intention of the testator in regard to other gifts contained in that will. This rule seems to be quite clear, whether it be carried to the full extent of compelling the legatee absolutely to hold by the will, or to renounce all benefit under it, which is the full doctrine, or whether it be limited, which I assume to be the case here, to an obligation to make compensation to the donee under the ineffectual gift. The doctrine of election is truly a consequence; it is superinduced upon the principle that the legatee is not to be arbitrarily deprived of either the right to disappoint, or the right to claim, but he must chose between those rights, the fundamental rule being that he cannot exercise both of them.

Now, my Lords, of course there must appear a clear intention on the face of the will to convey the property in respect of which

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the legatee has it in his full power to frustate the intention. I suppose that in this case there is no doubt about that. I do not think it necessary, as none of your Lordships has referred to that part of the matter, to refer to the point that was raised in regard to appointment upon the case of *Churchill* v. *Churchill* (1). My Lords, I should not have thought certainly that the principle was varied, because that which was done was, or professed to be, an appointment under a power, the testatrix not having had the power to appoint in the way and at the time that was attempted. I should not have thought that the principle was varied by arising in that shape. And my opinion is, that it does not arise in that shape in the present case, and that, in reality, the terms of the will are terms which necessarily imply an intention to bestow the property itself.

Then, my Lords, beyond that there seems to be no question of intention raised. Every testator intends that his will shall take full effect, and anything that prevents the will from being wholly effectual of course frustrates the intention of the testator to that extent. I cannot concur in the view that was very ably and ingeniously argued, that when it is said it is a question of intention, the meaning is, that the testator must have intended that the legatee, if he challenge or defeat any part of the will, shall be put to his election. That is clearly not so, because that would exclude from the operation of the principle every case in which a testator supposed that he had full power over the property which he professed and attempted to convey. That is contrary to all the authorities. It is quite fixed, I think, that it is wholly immaterial whether the testator thought that he had the power to convey the property, or knowing that he had not the power, usurped it. The rule in regard to election is in either case precisely the same.

My Lords, in regard to the plea that was maintained on the ground that in this case the right to the property conveyed was derivative, and only incidental to the *universitas* of the succession of *Rowland Edward Cooper*, I think that has been quite sufficiently dealt with already, indeed wholly exhausted, and I have nothing farther to remark upon it except this, that in the case of *Grissell*

(1) Law Rep. 5 Eq. 44.

v. *Swinhoe* (1) which was referred to at the Bar, the distinction was quite clearly brought out between the double right to take under the will, and to defeat part of its provisions emerging when the will comes into operation, and a subsequent succession to or acquisition of some right which would have that effect after the legacy, or the benefits bestowed by the will, had become unconditionally and fully vested. That is quite a different case; I do not say what the law applicable to it may be. But clearly in this case these two rights only came to co-exist at the time when the will came into operation; and therefore the claim to the legacy never arose except subject to the obligation to elect.

My Lords, lastly, it is said that in point of fact the Appellants here are not the owners of the property that was attempted to be conveyed, but have only a pecuniary claim upon the residue of the succession after the debts are paid. Upon that matter I shall only say that I entirely concur in thinking that the true test is this—whether the Appellants are in a condition effectually to elect, in other words, whether if they hold by the benefit conferred by the will, that will have the effect, to the extent of their share or claim upon the estate of *Pain's Hill*, of permitting it to devolve upon the Respondent in terms of the settlement. That it would do so I think there can be no doubt, and therefore I think it is quite clear that they, as far as this question is concerned, are the owners of the property in question.

Order appealed from varied.

The following Order was afterwards entered on the Journals:—

It is *ordered* and *adjudged*, by the Lords Spiritual and Temporal, in Parliament assembled, that the order of the Lords Justices of the Court of Appeal in Chancery, of the 11th of January, 1871, complained of in the appeal, be varied as follows, namely, by inserting after the words "appointed to him by the deed-poll of the 5th day of April, 1841, on the other hand," the following words, namely, "And let an inquiry be made whether it will be for the benefit of

(1) Law Rep. 7 Eq. 291.

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the said *Edith Theresa Dashwood* and her children to take under the provisions of the said will and codicils, or against the same;" and in the ensuing paragraph, by leaving out the word "Defendants" and inserting in lieu thereof the word "Defendant;" and also in the said paragraph, by inserting after the words "*Rowland Burrard Cooper* and" the following words "by or on behalf of the said," and by leaving out the words "the clear residuary personal estate of *Rowland Edward Cooper* be considered as it was at the death of the said testatrix, *Harriett Cooper*, and that in ascertaining the aforesaid clear shares therein of the Defendants *Rowland Burrard Cooper* and *Edith Theresa Dashwood*," and inserting the words "and for any purpose consequential thereon," and by leaving out the words "not discharged at the death of the said *Harriett Cooper*, the testatrix," and inserting the words "(such expenses, if not yet ascertained, to be estimated)": and that the said order, subject to the above-mentioned variations, be, and the same is, hereby affirmed: and that the cause be remitted back to the Court of Chancery, to do therein as shall be just and consistent with these variations and this judgment.

Lords' Journals, 4th May, 1874.

Solicitors for the Appellants: *Dimond & Son.*
Solicitors for the Respondents: *White, Broughton, & White.*

THE DIRECTORS, &c., OF THE EAST LONDON RAILWAY COMPANY . . . . . } PLAINTIFFS IN ERROR;

AND

JAMES WHITECHURCH AND OTHERS . . . } DEFENDANTS IN ERROR.

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Railway—Rating.

The *East London Railway Act*, 1865 (28 & 29 Vict. c. li.), authorized the making of several small railways, and the taking possession of lands for that purpose. Each of these railways passed through more than one parish. The 128th clause of the Act declared, "That if and while the company are possessed under this Act of any lands assessed, or liable to be assessed, to any sewers rate, consolidated rate, poor rate, police rate, main drainage rate, church rate, or other parochial or ward rate, they shall, from time to time, until the railway or the works thereof are completed and assessed, or liable to be assessed, be liable to make good the deficiency in the assessment for such rates, by reason of those lands being taken or used for the purposes of the railway or works; and the deficiency shall be computed according to the rental at which those lands with any buildings thereon are now rated." A portion of one of these railways was completely constructed in one parish, and was worked there. Till its completion there, the directors had paid in that parish the deficiency rate as provided in this clause. On its completion there, they claimed that they should be relieved from the deficiency rate:—

Held (reversing the judgment of the Exchequer Chamber, and restoring that of the Court of Exchequer), that the rate was properly a parochial rate, and that, on the completion of that portion of the railway in that parish, the title of the parish officers to claim the deficiency rate there had ceased.

Reg. v. *The Metropolitan District Railway Company* (1) overruled.

Observations on special clauses of arrangement introduced into Railway Acts.

THIS was a question on the construction of the 128th clause of the *East London Railway Act*, 1865 (28 Vict. c. li.) (2).

Mr. *Whitechurch* and others were the churchwardens and over-

(1) Law Rep. 6 Q. B. 698.

(2) "That if and while the company are possessed under this Act of any lands assessed or liable to be assessed to any sewers rate, consolidated rate, poor rate, police rate, main drainage rate, church rate, or any other parochial or ward rate, they shall from time to time, *until the railway or the works thereof are completed and assessed, or liable to be assessed*, be liable to make good the deficiency in the assessment for such rates, by reason of those lands being taken or used for the purposes of the railway or works, and the deficiency shall be computed according to the rental at which those lands with any buildings thereon are now rated."

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seers of the parish of *St. Mary, Rotherhithe*, and they brought an action against the directors and shareholders of the *East London Railway Company* to recover a sum of £310 4*s.* 3*d.*, alleged to be payable under the Act in question, for what was called a "Deficiency Rate." The directors had, under this Railway Act, taken possession of certain lands in the parish, and employed them for the purposes of the railways which under their Act they were authorized to make. This particular railway began, at its southern end, at the *New Cross Station*, ran in nearly a northerly line to the River *Thames*, and, passing by the *Deptford Road Station*, reached the *Rotherhithe Station*, and crossed the river to the *Wapping Station*, from which it was to proceed to the *Broad Street Station*. That portion of the railway which was within the parish of *St. Mary, Rotherhithe* (known as No. 1), had been completed, and was worked by the *London and Brighton Railway Company*. The *East London* directors, who had, up to that time, paid the deficiency rate in that parish, claimed that, as to that portion, the railway should be assessed only in the ordinary way. The parish officers, on the other hand, insisted that until the whole line of railway authorized by the Act of 1865 had been completed, each portion in every individual parish must pay the deficiency rate, under the provisions of the 128th section of the Act in question. The difference in the modes of assessment amounted, in this parish, to £310 4*s.* 3*d.* for the year. The Court of Exchequer, where the action was brought, ordered the facts to be turned into a special case, which was done, and upon argument Lord Chief Baron *Kelly*, Mr. Baron *Bramwell*, and Mr. Baron *Cleasby*, were of opinion that the judgment ought to be entered for the then Defendants, the directors. Mr. Baron *Martin* dissented (1). On error to the Exchequer Chamber the judgment was reversed (2), and the case was then brought up to this House.

Sir *John Karslake*, Q.C., and Mr. *Poland*, for the Plaintiffs in Error, the directors and proprietors of the railway company:—

The deficiency rate is no longer payable: it cannot continue to be payable until the whole line is completed. The earnings of a

(1) Law Rep. 7 Ex. 248. (2) Law Rep. 7 Ex. 424.

railway in each parish must be taken as the basis of the rate there. If it is capable of earning money in one parish, it is capable of being rated there, and then it comes within the words of this Act, "liable to be assessed." A contrary course would lead to great inconvenience and injustice. It would be a strange thing if, because the *Great Western Railway* was not completed in some part between *Bath* and *Bristol*, a deficiency rate should be charged upon all the parishes through which all the rest of the line passed, although in each of them the line was completely made and in full work, earning profits which could be rated. There is nothing in the Act which shews that the parish is to have a complete indemnity against loss for all time, or that, if the scheme should fail, the assessment is to be made upon what the lands and houses would have paid had they not been taken for the purposes of the railway.

The real meaning of the Act was that, while the works were going on, the land would be worthless for the purpose of rating upon rent, and could not be rated upon railway profits, and so would escape rating altogether, if a special provision was not introduced. So the special provision was introduced, and that made the land liable to the old rate until the completion of the railway within the parish, when the proper railway rating could be made. Whether that would be more or less profitable to the parish was not a matter dealt with by the Legislature. The deficiency rate might even be looked upon as a means of securing the early completion of the railway within the parish, and as soon as it was completed it would become "liable to be assessed."

In some of the judgments of the Court below it was assumed that the rule of construction must, in an Act of this kind, be, *à priori*, in favour of the parish, but there can be no such rule, and the words here shew that when the railway is completed the rating is to be that of a railway rate. For there was no intention on the part of the Legislature to interfere with the ordinary principle of rating, but merely to guard the parish against a loss which might continue for a long time, if there was to be no rate of any kind, while the railway works were in progress. The authority of *Reg.* v. *The Metropolitan District Railway Company* (1) is denied.

(1) Law Rep. 6 Q. B. 698.

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Mr. *Prentice*, Q.C., and Mr. *Morgan Howard*, for the Defendants in Error :—

There are several railways mentioned in this Act. Even admitting that all may not be liable to the deficiency rate till every one of them has been completed, still no one of them can be freed from that liability until the whole of that railway is completed. If part only is completed in a particular parish the deficiency rate continues as to the whole of that railway. The intention of the Legislature was, that, during the creation of a railway, the parish through which it was intended to run should be indemnified against loss. There could be no successful working of part of a railway, and of course no proper rating of it, in one parish, while other parts in other parishes were incomplete. The loss to the parish might otherwise be great. The line might run through a parish or a portion of a parish where the most valuable and highly rated property was situated, and that part might be left unfinished; while another portion of the railway running in another parish through property much less valuable was finished. The Legislature intended to secure the making of the whole line at as early a period as possible, and the liability to the deficiency rate was one of the means of securing the attainment of that object. While parts remained incomplete there could be no proper apportionment among the different parishes. [THE LORD CHANCELLOR:—Suppose the company gave up part of the line and never completed it, what then?] The right of the parish would be the same, and that might be part of the object of the Legislature. It would work no injustice to the company, and it would protect the parish and benefit the public to make it the object of the company to finish the whole railway. The words of the Act mean that till the whole railway is completed, not till a part of it in one particular parish has been completed, the company shall be liable to the deficiency rate. [Several sections of the Act were referred to as furnishing arguments, by analogy, that the words in this section must receive the construction here contended for.] They referred to *Wheeler* v. *The Metropolitan Board of Works* (1). The proper rule for the construction of a clause like the present was laid down

(1) Law Rep. 4 Ex. 303.

in *Reg.* v. *The Metropolitan District Railway Company* (1). The words used there, and used in the Act in this case, are, for all practical purposes, identical, the only difference being that there the word "railways" is in the plural, while here it is in the singular. As Mr. Justice *Keating* there said (2): "until the company complete their railways and works, so long they shall protect the parishes, so that each may be in the same position that it would have been, if the company had not taken these lands."

Sir *J. Karslake* replied.

THE LORD CHANCELLOR (Lord *Cairns*):—

My Lords, in the year 1865 the *East London Railway Company* was authorized to make a line of railway, commencing at *New Cross Station*, on the south side of the *Thames*, and ending at *Broad Street Station*, on the north side of the *Thames*. There was to be that main line which I have thus described, and there were also to be certain spurs or side lines at different parts. The route of these various railways was described in the Act of Parliament by numbers; No. 1 being the main line of railway from *New Cross Station* to the *Broad Street Station*. This railway so authorized was to pass through various parishes, and, among the rest, through the parish of *St. Mary, Rotherhithe*, and the railway has in point of fact been completed so far as that parish is concerned.

When an Act of Parliament is passed authorizing the construction of a railway—authorizing land and houses to be taken for the purpose of its construction, and the railway to be made upon the site of the houses, if nothing farther should be found in the Act of Parliament, it would of course follow that the railway company would be at liberty to pull down the houses which it had purchased, and to make the line within the time which is allowed for the purpose. And if, in the process of constructing the railway, the premises along the line became of a less assessable value than they were before, that, in the absence of any statutable provision upon the subject, would be an occurrence within those ordinary

(1) Law Rep. 6 Q. B. 698. (2) Law Rep. 6 Q. B. 704.

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powers which every landowner has over his own land in any parish, powers which enable him to use it for any purpose that he thinks fit. And if, in the course of using it, he renders the land of less assessable value, the parish and the parochial authorities have no choice but to submit. But, my Lords, it has been the habit in authorizing railways to be constructed, for the Legislature to take into consideration, and to make provision, with respect to the great inconvenience and loss which must necessarily occur to a parish during those years in which a railway is in process of construction, by the land being rendered of little or no assessable value during the period that elapses before the completion of the line. It is in consequence of a provision of this character, which occurs in the 128th clause of the *East London Railway Act*, that the present litigation has arisen. The question, and the only question, which your Lordships have to determine, is the proper construction of that section.

My Lords, I must suggest to your Lordships that that section should be approached, and its construction considered, without any *à priori* conclusion as to what would be the natural course for the Legislature to take under circumstances such as I have described. And I remind your Lordships of that—the more for this reason—because I observe in some of the judgments in the Court below arguments which appear to assume that the intention of the Legislature in these cases must be taken, *à priori*, to be that no loss shall be suffered by the parish during the construction of the line of railway. My Lords, I know no reason why there should be any such *à priori* assumption. It commends itself to our sense, on the part of the Legislature, of what may be a fair bargain to make, that some provision should be made with reference to land that must lie, or may lie, desolate and unproductive for a number of years; but it by no means follows that we can tell beforehand what will be the character of the bargain that the Legislature will make. That bargain may obviously assume one of two alternatives. It may be the wisdom of Parliament to say that the assessable value of the premises taken by the railway shall be calculated as it originally stood, until the time shall arrive that the whole line of railway authorized by the Act of Parliament, whatever that line of railway may be, shall have been completed.

Or it may be consistent with the design of the Legislature to say, looking to the case of each individual parish, that inasmuch as each parish shall or may be deprived of the value of that assessable thing which it possesses at the time when the Act of Parliament is passed, the sums at which the premises are at that time assessed shall be taken to be their assessable value until there is substituted for that in the parish another assessable property, capable of assessment, or really assessed, in lieu of that which formerly was assessed, whether it may or may not be a property as valuable as that which was previously assessed.

My Lords, I will add to what I have said this observation only. As regards an arrangement which would provide that the old assessable value should be continued as the basis of rating until the whole line of railway should be completed—it is obvious that this might or might not be an arrangement beneficial to the parish. It might well be that a railway made for a part of the way through the most profitable portion of the country, would be more productive, and more valuable for the purposes of assessment, than a railway made from end to end, some part of the railway passing through a country not so productive as the part of the country through which the shorter line passed. And, in addition, if any such bargain were to be made, the consequence would be this, that the original assessment would continue until every portion of the line, no matter how minute that portion might be, should be absolutely completed.

The Respondents at your Lordships' Bar contend, that, on the construction of the 128th clause of the *East London Railway Act*, the original assessment is to continue until the whole line of railway authorized by the Act of Parliament, or, at all events, until the whole line of railway described as "Railway No. 1," from *New Cross Station* to *Broad Street Station* shall have been completed. Several of the Judges in the Courts below, altogether six in number, were of that opinion, which is what is contended for by the Respondents. On the other hand, the Appellants contend that as soon as there is in any particular parish a completed railway, although that railway may be a portion of a larger line, yet as soon as there is in the parish a completed railway which can be assessed and ought to be assessed, that is the terminus of the

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interval which has been provided for by the Legislature during which the old assessment is to continue; and of that opinion, which is contended for by the Appellants, there have been five learned Judges in the Courts below.

Now, my Lords, the section is the 128th, and it runs in these words:—[His Lordship read it, see *ante*, p. 81.]

Your Lordships will observe with regard to this section that there are two assessments spoken of and contemplated by it. The one is the present or existing assessment, "while the company are possessed under the Act of any lands assessed or liable to be assessed." The other is an assessment which is future, and which is itself to be the terminus of the interval during which the old assessment is to continue "until the railway, or the works thereof, are completed and assessed, or liable to be assessed." This consideration alone would naturally lead your Lordships to the conclusion that the two assessments spoken of, the present, which is the existing assessment, and the future, which is to be the substituted assessment, are assessments *ejusdem generis*, and inasmuch as the first is a parochial assessment, the second, which is to be the substituted assessment, must be a parochial assessment also.

And, my Lords, in fact that appears to me to be the clue to the construction of the whole of the section, because if your Lordships will take the trouble to insert the words "in any parish" after the word "assessed" in the second line of the clause (and when I say insert, I do not ask your Lordships to read in words, by way of addition to, or alteration of, the clause, but merely to express upon the face of the clause those words which are necessarily and beyond all dispute to be understood), if I say you will read in after "assessed" the words "in any parish," and then do me the favour to follow the clause, after reading in those words, it will run thus: "If and while the company are possessed under this Act of any lands assessed or liable to be assessed in any parish to any parochial rate, they shall, from time to time, until the railway or the works thereof are completed and assessed" (which, of course, also must mean "in the parish"), "or liable to be assessed, be liable to make good the deficiency." Then your Lordships have clearly and plainly an expression on the part of the Legislature of its intention that until the existing parochial assessment is replaced by

another parochial assessment, always looking to the same parish, the old or original parochial assessment is to continue.

And, my Lords, if additional proof were wanted that that is the true construction of the section, what appears to me to be that additional proof is this: If your Lordships were to adopt the opinion of the majority of the learned Judges in the Court below in favour of the parish officers, the consequence would be that all those words which follow the word "completed," might be entirely removed, and ought to be removed, out of the clause; because, if what I have termed the interval, during which the old rate is to prevail, must continue until the railway is completed from end to end, the words that ought to have been used would be simply "until the railway or the works thereof shall be completed," and those words "and assessed, or liable to be assessed," ought not to be added; they would be entirely superfluous.

My Lords, for these short and simple reasons I am of opinion that the construction put upon this clause by the minority of the learned Judges in the Courts below, namely, by the five learned Judges, is the correct one.

My Lords, I will only add to what I have said, that I attach little, if any, weight at all to some arguments which were attempted to be drawn from the other clauses in this Act, which are in the nature of private bargains with particular parishes. We all know how these clauses are inserted in an Act of Parliament of this kind. They are in the nature of private arrangements put into the Act at the instance of particular parties, who either act with greater caution than other parties, or act with a desire to make a better bargain for themselves than other parties have made. They are not put in by the Legislature as part of a general scheme of legislation which it desires to express, but they are in the nature of particular contracts, and ought not to have any effect upon the construction of a general clause such as that which I have read to your Lordships.

My Lords, I will add also this, that inasmuch as a case which was decided in the Court of Queen's Bench, the case of *Reg.* v. *The Metropolitan District Railway Company* (1) was much commented upon at your Lordships' Bar, I cannot avoid stating that,

(1) Law Rep. 6 Q. B. 698.

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having carefully considered that case, I am obliged to admit that the view that I have offered to your Lordships of this section is inconsistent with the view taken in that case. It is true that that case proceeded upon the construction, not of this Act of Parliament, but of an Act of Parliament which contains words not precisely identical, but words which appear to me to be in substance the same; and I am bound to admit that the view which I certainly entertain of this clause, and which I ask your Lordships to adopt, is a view which must supersede the view taken by the Court of Queen's Bench in that case.

I submit to your Lordships that the judgment of the Court below, in favour of the parochial authorities, ought to be reversed, and that judgment ought to be given for the Plaintiffs in Error.

LORD CHELMSFORD:—

My Lords, the question in this case cannot be regarded as one entirely free from difficulty, considering the great diversity of opinion which has existed among the learned Judges who have decided it, and considering also the judgment of the Court of Queen's Bench in *Reg.* v. *The Metropolitan District Railway Company* (1), which was thought by some of the Judges who were favour of the Defendants in Error to be undistinguishable from the present case.

The question depends altogether on the meaning of a few words in the 128th section of the *East London Railway Act*, viz. "The railway or the works thereof"—whether by those words is intended the whole of the railways and the works—or, whether the liability of the company to make good the deficiency in the assessment, arising from the possession of lands acquired under the Act, (which lands were previously liable to be assessed to the poor rate and other rates,) is at an end when the railway or the works thereof are so far completed in any parish as to have become liable to be assessed therein. It is not difficult to understand what the intention of the Legislature was in inserting this clause in the special Act, and, in somewhat similar terms, in the provision in the 133rd section of the *Lands Clauses Act* incorporated with it. Where lands in any parish in respect of which rates have been levied are

(1) Law Rep. 6 Q. B. 698.

taken by a railway or any other company for the purpose of the undertaking, the lands during the progress of the works cease to be of any assessable value, and it is only just and reasonable that while this state of things continues the parish should be protected against any deficiency in the rates, and the company be made liable to the exact extent to which the former occupiers were liable, by computing the deficiency according to the rental at which the lands were before rated. But when the reason for the provision ceases, it seems reasonable that the operation of the provision itself should cease, and that where an assessable subject is brought into existence, it should come in the place of the lands which were taken away for the purpose of creating this new subject of assessment. These considerations render probable an interpretation of the clause in question which should limit it to the continuance of the circumstances which occasioned the necessity for its enactment.

But still the intention of the Legislature must be determined by the words that have been used, and it was held by a majority of four Judges to two in the Exchequer Chamber, that the words "the railway or the works thereof" meant the whole of the railway and works, and that, until the entire railway and works were completed, the parishes along the line were entitled to charge the company with the amount of the deficiency in the rate arising from the lands taken for the railway being withdrawn from assessment.

If this is the proper construction of the clause, then the consequence mentioned in the argument necessarily follows, that if any portion (however small) of the railway or works is not completed the company must be charged with the rate previously assessed upon the lands taken, and, it may be added, if the smallest portion is not completed within the five years limited for the execution of their powers, this particular liability must continue for ever. One would not be disposed to adopt a construction leading to such unreasonable consequences unless compelled to do so by the clear and unambiguous words of the Act.

It was said that the Legislature must have intended the completion of the whole line to be the period at which the company's liability to make good the deficiency in the rate shall cease, because until the whole works have been completed the rates cannot be properly apportioned amongst the different parishes. But this

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argument proceeds upon an entire forgetfulness of the principle upon which railways are rated. Like every other species of rateable property the rateable value is determined by the amount which a lessee would pay for the railway in the particular parish, and it has been determined that this principle of rating is applicable in a case where the railway extends into different parishes, though the profits may be earned in different proportions, and with a different rate of out-goings in each: *Reg.* v. *London, Brighton, and South Coast Railway Company* (1). Whether, therefore, the railway is complete or incomplete throughout the line, there is never any apportionment of the rates to which a railway company is liable, but each question of the amount of liability must be determined within the limits of each particular parish. This must frequently be a very difficult problem to solve, but of course just as difficult where an entire line of railway is completed as where part only has been constructed and is being worked through different parishes. Mr. Justice *Willes*, in his judgment in this very case, says (2): "That a railway can be worked successfully within the limits of a parish can scarcely be supposed or suggested." But in the present case there is no occasion for supposition, for it is stated as a fact in the special case that the railway within the parish of *Rotherhithe* is complete, and is let to and worked by the *London, Brighton, and South Coast Company;* whether successfully or not is wholly immaterial.

The same learned Judge seems to consider that the Legislature intended the clause as one of indemnity to the parish, for he says (3), that "The company having taken from the parish what was liable to the rates, they should compensate the parish for the loss just as they would a private individual. If they make increased profits they ought to pay in proportion to those profits. If, on the other hand, these profits are not equal to the former profits of the land, they ought to pay the deficiency." And it was argued at your Lordships' Bar that the parish officers had an option whether they would rate the company upon the railway, or continue to rate the company upon the rental of the lands acquired by it under the Act. I certainly do not so read the clause, but

(1) 15 Q. B. 313. (2) Law Rep. 7 Ex. 439.
(3) Law Rep. 7 Ex. 438.

consider that if the railway is liable to be assessed, the parish is compellable to rate it, even though such rating may be less beneficial than that which the parish was entitled to while the railway was in the course of construction.

In construing the clause I lay the greatest stress upon the words "liable to be assessed," which Mr. Justice *Blackburn* thinks may be rejected as surplusage (1), and for a reason which appears to me to give additional force to those very words, viz., "That as soon as there is a beneficial occupation the railway and works must be assessed, and any ratepayer would be entitled to insist upon it, and the overseer would be bound to include it in the assessment." If the words had been merely "until the railway or the works thereof are completed and assessed," there would have been much stronger ground for arguing that it was intended to allow the parish officers to elect between the two modes of rating, and if they chose not to assess the railway that they might continue to collect what for distinction's sake I will call the "deficiency rate." But when the words "liable to be assessed" are added, then the only question is as to the liability of the railway company; for if liable, as Mr. Justice *Blackburn* says, the parish is bound to make the assessment, and might be compelled by any ratepayer to do so.

I have already observed upon the unreasonable consequences which would follow from adopting the construction contended for by the parish, that by the words "The railway or the works thereof," the whole of the railway and works are meant. And this being the result of such an interpretation of the clause in question, it becomes necessary to see whether it will not bear a different and more probable construction. Now it appears to me from the context that the words "Railway or the works thereof," are more applicable to the different parts of the railway than to the whole of it taken together. The object of the clause is to regulate the assessment of the company during the construction of the line of railway; an assessment which must take place in the different parishes through which the line passes. If it had been merely provided that the liability to make good the deficiency in the assessment should continue until the railway or the works thereof were completed, this necessarily would have applied to the

(1) Law Rep. 7 Ex. 435.

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whole line. But when the words "assessed or liable to be assessed" are added, this can only apply to the portions of the line in the different parishes, as only in each of these can it be known whether the liability to assessment has arisen or not by the completion or non-completion of the railway within each. Therefore there is no necessity "to read in," as Mr. Justice *Brett* says, the words "in the parish," for those words are necessarily involved in the word "railways" taken with its context.

I must, before I conclude, advert to the case of *Reg.* v. *The Metropolitan District Railway Company* (1), which some of the Judges in the Courts below, who were in favour of the Appellants, tried to distinguish from the present case, and which the majority considered to be a decision to be followed. I cannot perceive any real distinction between the two cases, nor can I acquiesce in the propriety of the judgment in that case. The distinctions suggested are, that in the clause in the *Metropolitan District Railways Act* corresponding with the clause 128 in the *East London Railway Act*, the word "railways" in the plural is used, and Mr. Baron *Cleasby* said he did not see how the Court could, without making a new Act of Parliament, construe the word "railways" into "the railway in a particular parish;" and that the facts were different, because only a part of the railway in the parish was completed. There is no substantial difference in the clauses in the two Acts, and the words "assessed or liable to be assessed," being in both of them, must of necessity limit the word "railways" to the railways in a particular parish, for the reasons I have already given. And although all the lands in the parish which were possessed by the company for the purposes of the railway had not been so applied, yet the part of the railway and works in the parish was completed and had been opened for traffic, and consequently was liable to be assessed. Therefore the assessment for that part ought to have been made according to the principle for rating railways, the remainder of the lands being rateable according to the rental at which they were rated at the time of the passing of the Act.

For the reasons which I have thus fully explained, I think the judgment of the Exchequer Chamber was wrong, and ought to be reversed.

(1) Law Rep. 6 Q. B. 698.

LORD HATHERLEY:—

My Lords, I am entirely of the same opinion. I should have expressed my opinion fully upon the case, but after the observations of the noble and learned Lords who have preceded me, I scarcely think it necessary to make any observation upon it.

I rely entirely upon the construction of the 128th clause, not importing any words thereinto, nor omitting any words therefrom. You find that the word "railway" is used in that clause, and you ask yourselves to what is that word to be applied, regard being had to the whole subject-matter of the clause. You find that the word "railway" is used in the singular in the whole Act. In the first place where we meet with it, it is used to describe the railways which are all together to be made into one whole entirety, called "*The East London Railway.*" We do not find that term used in any other part of the Act, except as describing the company, which is called "*The East London Railway Company.*" You find, in the 22nd clause, a series of no less than seven railways, each of which is called successively a "railway" in the singular, from No. 1 to No. 7, No. 1 being the main line, that is, the line which passes through the parish of *St. Mary, Rotherhithe.* But when you come to the 128th section, you ask yourselves what is the subject-matter of that clause, and you find that its subject-matter is this: it is simply dealing with the rates which were assessable in the different parishes through which the railway passes, and every railway must be assessed in a particular parish in respect of the property which is found in that parish. The rates cannot be assessed for Parish *A.* in Parish *B.*, nor for Parish *B.* in Parish *C.*, and so on. Therefore you come necessarily to the conclusion upon which I understand my noble and learned friend upon the woolsack to have in a great measure rested his view of the case, that the "railway" spoken of in the 128th clause as the railway assessed or liable to be assessed must be a subject within the parish, without which it would be impossible that the assessment should be made. And there is nothing to say that in dealing with the assessment of the railway in any particular parish, the overseers of that parish are to wait until the whole of the railway is completed throughout the several other parishes through which it may run; and even beyond that, to wait indefinitely, if,

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within the five years specified by another section of the Act, the rest of the railway is not completed.

It seems to me, my Lords, with great deference for the views which have been expressed in the Courts below, differing, as I do, from many of the learned Judges who have taken part in the decision of this case, that I cannot apply the term "railway" in the 128th section to anything else except that which is the subject-matter of assessment in the particular parish in which that railway may exist. If that be so, each parish stands upon its own ground, and the whole case is determined in that way. The time for assessment is the time which regulates the rateability of the railway, in each parish, upon the new system.

LORD O'HAGAN:—

My Lords, concurring as I do entirely with the noble and learned Lords who have addressed the House, I should have been quite content to rest my concurrence upon the facts and opinions stated by them, but I think the conflict of opinion in the Courts below so remarkable, and the case so important, that it may be becoming that I should, in the briefest terms, express the grounds upon which I take a different view from the majority of the learned Judges. I confess I have had much doubt and hesitation in forming my judgment. The arguments are nicely balanced; and whether we regard the terms of the statute we are required to construe, or the probable purpose of the Legislature as indicated by those terms, there is little room for dogmatic confidence on one side or the other.

The whole question arises on the few words of the section we have heard so elaborately discussed. It provides that whilst the railway company is possessed of lands assessed or assessable in the modes which it specifies, lands taken or used for the purpose of the railway, "they shall from time to time until the railway or the works thereof are completed and assessed, or liable to be assessed," be responsible for the deficiency created in the assessment by reason of lands being so taken or used. Does this provision import that the railway company shall be liable to make up the deficiency until the whole line from end to end shall be

assessed or assessable, or only until a portion shall be so far completed within a given district as to be assessed or assessable?

As I have said, the terms of the section appear to me more or less to warrant the suggestion and the contention on either side. "The railway" is an expression which *primâ facie* may, and in many cases absolutely must, be taken to indicate the entire railway contemplated and described by the Legislature. But the generality of that expression may be modified either by the context, or by the manifest purpose, to be inferred from surrounding circumstances and the necessity of a more limited application, to employ it in a restricted sense. And it is plain that the modification may be wrought as effectually in the second way as in the first. In the very statutes with which we are dealing the expression is repeatedly employed in such a collocation as to render the larger interpretation clearly inadmissible. And so when we seek the purpose of the framers of the Act, there is ground for serious question. Did the Legislature mean to give the parish the advantage only of the rateable value of the railway when assessed or assessable within its own limits, or the value, larger or smaller, as the case may be, of the proportion to which it might become entitled on the assessment of the entire line after its ultimate completion? We are confidently and strongly urged to adopt these antagonistic views by the Plaintiffs and the Defendants respectively, but the statute gives no certain indication upon them, and it is not very clear from anything declared by it to which of them we should adhere.

In this state of things it does not seem improper to examine carefully the circumstances of the case, and reach, if we can, the reason of the legislation as affording some guide to the ascertainment of its meaning and extent. What was the mischief to be remedied? What was the remedy to be supplied? If an Act is plain and decisive in its phraseology, we are bound to accept it in the ordinary and natural sense, and we are not at liberty to enter on fine-drawn speculations as to the mind of Parliament, which has been by itself sufficiently demonstrated. But when the demonstration is equivocal and open to controversy, we are free to seek satisfaction by ascertaining, if we can, the object which the statute was designed to advance.

When a railway runs into a parish and destroys valuable stores

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and houses, it diminishes the amount of the rates, and so deteriorates the public funds of the district, and the mischief so accomplished may continue for a considerable time with continuous disadvantage to the local community. For this evil it was plainly proper that there should be a remedy. The loss caused by the railway should be made good by the railway itself; and until for the rateable property destroyed other rateable property is substituted, the proprietors of the railway should supply the deficiency which was the fruit of their own work done for their own advantage. This was the manifest object of the section we are considering, and it seems to me that it will answer all the requisitions of justice and reason if it is held to secure to the parish, in a railway, or a section of a railway, completed within its bounds and rated for its benefit, a substantial substitute for the property removed. I do not see what more the parish is entitled to ask, or the railway bound to afford.

Now, note the facts in the case before us. The railway is to be made from the *Deptford Road Station* to the *Broad Street Station*. It is finished so far as the *Wapping Station*. It is worked. It is leased to, and in the occupation of, the *London, Brighton, and South Coast Railway Company*. All these works in the parish of *St. Mary, Rotherhithe*, of which the Plaintiffs are overseers, are completed. It is rateable; nay, more, it has been rated; for the *Brighton Company* claimed to be rated as occupying it, and was rated accordingly, the dispute being whether the rating should have been upon the deficiency on the old rates, or the rateable value of the railway. The Defendants had paid the amount of the deficiency whilst the railway was in course of construction, but declined to pay more than the rate on its actual value within the bounds of the parish after it had been so far completed and in action.

In this state of circumstances it appears to me that the construction adopted by the Defendants is more accordant with the true purpose of the Legislature as I have apprehended it, and with the fair relation which should subsist between the parish and the railway. And I think the terms of the section, well considered, are quite reconcilable with that reasonable interpretation. As I have said, the expression "the railway," more or less comprehensive according to collocation and circumstances, is equivocal, and

if on the one side it be argued that there must be an interpolation of the words "in this parish" to sustain the Defendants' case, on the other it is answered that the Plaintiffs must interpolate "whole" before "railway" to support their contention. And so the difficulty of interpolation arises either way.

Then, when we find that the liability of the company is to continue only "until the railway or the works thereof are completed and assessed or liable to be assessed," can we say that the liability to assessment did not arise when a portion of the railway, working and making profit, and plainly capable of valuation for the purpose of assessment, had been completed within the parish? Was not the liability "to be assessed" a liability to be assessed "*within the parish?*" Were not the parish officers entitled to make an assessment, and would they not have been compellable to make it on such property in such circumstances? Then what is meant by the distinction taken between "the railway" and "the works thereof"? Are the railway and the works identical? If so, the latter words are insensible; but are we at liberty to say that they have no meaning? And if they have any, may they not be taken to point to a distinction between the whole railway and works belonging to it, constituting a portion of it, and when partially completed capable of assessment and "liable to be assessed." And when so liable, limiting the claim of the parish to a rating according to their value? I cannot concur with one of the learned Judges that this phrase "liable to be assessed" is surplusage. On the contrary, I think it has much significance and materiality in the case.

I shall not dwell on other points which have been fully discussed already. But I may observe that I do not think the Plaintiffs' case is much assisted by a consideration of the larger advantage to be derived by them, on the assumption that a rating with reference to the completed railway would more largely benefit the parochial funds, than a rating of the portion within the parish. For, in the first place, such an assumption would not be justified, as, in conceivable circumstances, pointed out by Sir *John Karslake*, the rating on the part might be more profitable than a proportional rating on the whole. In the second place, we have no right to assume that the Act intended to secure to the parish the greatest possible advantage. The Legislature must be taken,

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whilst it sought to secure due protection to the parish, to have designed no inordinate pressure upon the company. And in connection with this I must observe, that the possible continuance of a claim for the deficiency, for an indefinite, and, perhaps, an unending period after the completion of the railway works within the parish, and before the completion of it all, seems a consequence of this argument of the Plaintiffs, fairly accepted by their counsel, but rendering the adoption of this conclusion difficult, from, to me at least, its apparent hardship and unreasonableness.

For these reasons I concur with the minority of the learned Judges, and think that the judgment of the majority ought to be reversed.

LORD SELBORNE :—

My Lords, the words of the 128th section of the Special Act appear to me to be quite sufficient to decide this question in favour of the Appellant Company, merely by following their natural and reasonable construction, without resorting to any presumption as to the intention of the Legislature, beyond what these words, in their proper signification, express.

The governing words of the section, from first to last, are those which relate to the parochial and other local assessments, and subjects of assessment, which it is the object of the clause to regulate. The language which we have to construe occurs in the middle of a single sentence, in the preceding, as well as in the subsequent, context of which, either the same words, "assessed or liable to be assessed," or the corresponding term, "the assessment," also occur. In the preceding and in the subsequent context it is plain and undeniable that a particular local assessment is in view; which assessment could only be laid upon the railway or works within one particular parish or area of rating, and could not possibly be laid upon the whole of the line passing through several different parishes or areas of rating. It is true that these words are intended to furnish a general rule, applicable, distributively, to all lands, and to every parish or other area of rating, through the whole course of the line; but they do so in terms relative, not to the aggregate of the assessment in all such parishes or places, but to each separate assessment in each separate parish or place.

The sentence, therefore, read (for brevity's sake with reference

to parochial rates only,) with the addition merely of words expressing, in these two parts of it, what is there necessarily implied in the words "assessed" and "assessment," would stand in a form which I do not now repeat, because it has been already stated to your Lordships by my noble and learned friend on the woolsack. When the sentence is so read it seems impossible not to extend the influence of the words "within the parish" (which express merely the sense inherent in the words "assessed" and "assessment") to the words "assessed or liable to be assessed," as they occur in the middle of the sentence also. The "railway, or the works thereof," there spoken of, is a subject of which it can be, and is there predicated, that, when completed, it may be "assessed, or liable to be assessed." Strictly, this cannot be predicated of a railway passing through several parishes, when considered as a whole. Each assessment must (as I have already said) be laid on the railway or works in the particular parish, and on that part only. This is the sense in which we find the corresponding words as to assessment used both before and afterwards; and the whole sentence relates to "lands" (that is to particular lands which must be situate in some particular parish), which are to be assessed in one way "until the railway or the works thereof are completed and assessed, or liable to be assessed," and in another way after that time has arrived. I find nothing in the context (nor, I may add, in the reason of the case) to justify the suggestion at the Bar, that in the part of the sentence which fixes that time, and there only, the Legislature, by the words "assessed or liable to be assessed" meant the aggregate assessments or liabilities to assessment, of all the different parts and works of the railway in the several parishes or places through which, when completed according to the authority given by Parliament, it would pass.

The judgment of the Court of Exchequer Chamber must therefore be reversed.

Judgment of the Court of Exchequer Chamber, reversed.

Lords' Journals, 19th May, 1874.

Attorneys for Plaintiffs in Error: *Wilson, Bristows, & Carpmael.*
Attorneys for Defendants in Error: *Hawks, Willmott, & Stokes.*

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May 11, 12, 19.

JOHN BEATTIE AND OTHERS . . . . . APPELLANTS;
AND
LORD EBURY AND OTHERS . . . . . RESPONDENTS.

Railway—Bank—Transfer of Shares—Personal Responsibility of Directors—Practice.

4 Ch D 760
5 Q B D 294
4 Ch D 636
6 Q B D 703
9 Ch D. 481.

If a man misrepresents a fact, to that fact he is bound, if any other person, misled by such misrepresentation, acts upon it, and thereby suffers damage.

A direction given by persons who are directors of a company to their bankers, when the company had a balance in the hands of the bankers, to honour cheques drawn and signed in a particular manner, does not of itself impose on the directors any personal responsibility as to those cheques. This direction is in no sense a misrepresentation, so as to make personally liable those who gave it to those who acted upon it.

Nor, though that direction should continue to be acted on by the bankers after the company's account has been overdrawn, will it entail on the directors who gave it any personal liability. Nor will it entail any such liability on those who, at a subsequent meeting of the board of directors, confirmed the minutes of the board meeting at which it was given, and who drew cheques in accordance with it, though the account was overdrawn when these latter cheques were issued and honoured.

Bankers under advances to a railway company made a demand on the directors of the company to deliver to them as "security" for the advances "unissued shares" of the company, and "such preference shares and debentures as you may obtain authority to raise in next session of Parliament." This demand was not construed to mean that the shares and debentures should be paid-up shares and debentures, and the directors by delivering unissued shares and debentures (on which money had not been paid), were not guilty of any misrepresentation, and did not render themselves liable to make good to the bankers those shares and debentures.

Where bankers have demanded and received unissued preference shares of a railway company as "collateral security" for advances they have made on the company's cheques, and have been registered on the registry of the company as the holders of such shares, a Court of Equity will examine into the circumstances of the transaction, and can direct the proper steps to be taken to cancel such registration.

The Order of the House directed the officers of the railway company to take all proper measures for cancelling the registration. But the order on the Appellants to pay costs was not postponed till the bankers' names had been taken off the register.

THIS was an appeal against a decision of the Lords Justices, by which a previous decision of Vice-Chancellor *Bacon* had been reversed (1).

(1) Law Rep. 7 Ch. Ap. 777, where the facts and the judgments on the original case and on the appeal to the Lords Justices are fully given. The judgment of Vice-Chancellor *Bacon* is given Law Rep. 7 Ch. Ap. 788, n.

The Appellants, who represented the *Union Bank of London*, had sued the Respondents, who were the directors of the *Watford and Rickmansworth Railway Company*, for the amount of certain sums due to the bank on accounts overdrawn by the means of cheques, on which, as the Appellants contended, the Respondents had by their letters and conduct made themselves personally responsible. The letters and the acts of the parties are so fully stated and commented on in the judgments of the noble and learned Lords that a detail of them here would be quite useless. The foundation of the claim was a letter dated the 4th of July, 1860, sent in pursuance of a resolution passed at a meeting of the railway directors on that day, at which Messrs. *Capel, Cary,* and *Warwick* were present. The letter was in these terms :—

"To the Directors of the *Union Bank of London*, or their Manager at the *Temple Bar* Branch.

"Gentlemen,—

"*Watford and Rickmansworth Railway.*

"Please to honour the cheques of this company signed by two of the directors, and countersigned by the secretary.

"*Joseph Cary,*
"*Reg. Capel,*
"*J. Warwick.*"

At the moment this letter was written the railway company had a balance in the hands of the bankers.

Lord *Ebury* was present at the next meeting of the railway directors, when the minutes containing the resolution and the letter were confirmed. The resolution was afterwards acted on by the different directors on various occasions.

The railway directors required advances, and borrowed some money from the bankers. The special acts of borrowing appeared to have been made the subjects of special contracts, which were always duly performed; but many cheques drawn and signed in accordance with the above resolution were honoured, and the general account of the railway company with the bankers came to be considerably overdrawn.

In the course of their dealings with each other, the bankers had more than once required securities to cover these overdrawn accounts,

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and had received debentures and preference shares, ("lodged as collateral security,") in respect of which the officials of the bank had been put upon the register of shareholders in the railway.

In March, 1865, the bankers commenced an action in the Court of Common Pleas to recover the debt due from the railway company, and obtained a verdict for the full amount claimed. In this action had been included the sums which had been the subject of special and personal contracts with the railway directors, and the verdict and judgment were given for the gross amount of both sets of claims. The money due on the personal contracts of the railway directors was paid, and the original verdict for £32,408 was thus reduced by £9436, and the bankers sued out an *elegit* against the railway company for the balance (£23,334) due for principal and interest. The writ was lodged with the sheriff of *Hertfordshire*, who, by a seizure on the property of the railway company, levied and paid to the bankers a sum of £212. 18*s.* 4*d.*

On the 8th of August, 1868, the bankers filed their bill (amended in August, 1869) against the railway directors and the *Watford and Rickmansworth Railway Company*, in which the bankers insisted that the directors were personally liable to make good the advances made upon cheques authenticated as described in the letter of the 4th of July, 1860, and that they, the bankers, never had any interest in the stocks and shares of the company, except to hold them as collateral security; and they prayed for relief in respect of the debt due to the bank, and also relief from any liability on the shares.

Answers were put in, and evidence taken; and on the 6th of March, 1872, Vice-Chancellor *Bacon* made a decree declaring the transfer of the shares null, and the entry of the bankers' names on the register improperly made, and also directing that the Defendants, the railway directors, should do all such acts as were necessary to effect the cancellation of the transfer. The decree also directed an account of what was due to the bank for advances made to the railway company, and declared the Defendants as the directors personally liable to pay what should be found due. The case was taken by appeal before the Lords Justices, who, on the 19th of July, 1872, reversed the order of the Vice-Chancellor, and, (so far as concerned the part relating to the personal liability of

the directors,) ordered the bill to be dismissed with costs as to the directors named. This appeal was then brought.

There was no decision in the Lords Justices' Court on that part of the order which directed the cancellation of the registry of the shares.

Mr. *Swanston*, Q.C., and Mr. *T. A. Roberts*, for the Appellants :—

The railway company here was in want of funds. The directors made themselves personally responsible in order to obtain them. By their letter to the bankers they must be taken as having represented themselves clothed with authority to obtain the funds, and to direct that cheques drawn in a particular manner were to be honoured. If they had no lawful authority to pledge the credit of the company they were guilty of a misrepresentation, on which they induced other people to act, and they were bound to make good their own representations : *Collen* v. *Wright* (1). Their own Act did not authorize them to do what they pretended to do, and, consequently, what they did was done on their personal responsibility. When asked for securities they handed to the Appellants preference shares and debentures, and by so doing bound themselves to make good these securities. That was the principle acted on in *Higgins* v. *Livingstone*, where Lord *Eldon* thus stated the ground of such obligation (2) : "As to the general liability of parliamentary trustees, if I were to give an opinion, I would say that where persons act under a parliamentary trust, and state themselves as so acting, they are not to be held personally responsible. But this also, I think, rests on strong principle, that as the trustees must know whether there are funds to answer the purpose, they, when they contract with others who do not know, act as if representing that they had a fund applicable to the object, and are then personally bound to provide a fund to pay the contractors." On that principle the Respondents here are clearly liable.

It is admitted that if trustees act strictly within the line of their duty, they do not make themselves personally responsible; but, as the Vice-Chancellor said in *Wilson* v. *Goodman* (3), where they neglect that line and go beyond it, they become personally responsible. The Respondents did so here. The case of *Cherry* v. *Bank of Australasia* (4) is directly in point with the present; and

(1) 8 El. & Bl. 647. 4 Jur. N.S. 357
(2) 4 Dow. 341, 355.
(3) 4 Hare, 54, 62.
(4) Law Rep. 3 Pr. Co. 24.

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there, because the directors had authorized a person named *Clarke* to draw a sum of £4000, when they had no legal power so to authorize him, they were held responsible. So in *Lewis* v. *Nicholson* (1) they were held liable because they represented that they had authority which they did not in reality possess. [LORD O'HAGAN: What misrepresentation do you find in the letter of July?] The direction to honour the cheques as if they had full authority so to draw the cheques, which at the time they had not, was itself a misrepresentation; it was one intended to induce the Appellants to act upon it, and they did act upon it. *Richardson* v. *Williamson* (2) shews that if persons induce others to believe that they have power to enter into binding contracts on behalf of third persons when such is not the fact, those who so misrepresent their own powers are bound to make good what they have done. There is a class of cases, all decided on the same principle, of which *Gurney* v. *Behrend* (3) is an instance. So where persons have induced others to purchase a bill supposed to be foreign, but which was not so, and for want of a stamp was therefore invalid, the purchaser has been held entitled to recover, the false representation being sufficient to give him that right, even though the person who made it was at the time ignorant of the fact: *Gompertz* v. *Bartlett* (4); *Young* v. *Cole* (5). And in *George* v. *Skivington* (6) the same principle was applied to the sale of hair wash, though the person who sold it did not know that it was injurious. In *Parrott* v. *Eyre* (7) the Defendant signed, as chairman of a board of road trustees appointed under the provisions of a Road Act, a resolution that the Plaintiff (the treasurer) should be requested to make an advance of £1000 to the board; no bond was given to secure the advance, but the trustees who had requested the advance, though they sent to the Plaintiff a signed minute of the resolution by which they made the request, were held to have made themselves personally responsible to him. And a company may make itself liable by adopting an agreement made by one of its promoters: *Williams* v. *St. George's Harbour Company* (8), where proceedings had at first been taken against the individual

(1) 18 Q. B. 503.
(2) Law Rep. 6 Q. B. 276.
(3) 3 El. & Bl. 622.
(4) 2 El. & Bl. 849.
(5) 3 Bing. N. C. 724.
(6) Law Rep. 5 Ex. 1.
(7) 10 Bing. 283.
(8) 2 De G. & J. 547; 27 L. J. (Ch.) 691.

promoter, and the company had then taken on itself the responsibility which it was never denied he had incurred.

In this case Lord Justice *Mellish* laid down the broad proposition that a man was not "liable for making a misrepresentation unless it is a misrepresentation in point of fact, and not merely in point of law" (1); but that depends on what is the nature of that misrepresentation. If it is a misrepresentation of a legal right, pretended to be possessed by the person who asserts it, and a man is injured thereby, he may claim compensation. The misrepresentation in itself may be nothing, it may be that of a mere opinion on doctrine, but if it is a misrepresentation as to title, and the rights and character of the parties who make it, and if it is made with the intention of inducing another to act upon it, and it does so induce him to act, and he thereby suffers, he may obtain compensation. Here the misrepresentation was as to the fact that they, as directors, had power to authorize a general drawing of cheques, and possessed the character and the right of directors vested with such a power. This misrepresentation brought it within the principle of *Richardson* v. *Williamson* (2), where, because directors signed a certificate as to the deposit and repayment of a sum of money which their society had no legal power to borrow, they were held personally liable.

It is not to be supposed that Courts will treat a mistake in point of law as something which may be committed under such circumstances without giving a right to compensation. In *Stone* v. *Godfrey* (3) it was expressly decided that the Court will relieve against mistakes in point of law as well as mistakes in point of fact; and *Broughton* v. *Hutt* (4) is to the same effect. *Rashdall* v. *Ford* (5) was referred to by the Lord Justice *Mellish* in the Court below (6) as establishing a different principle; but that case does not authorize the conclusions drawn from it. He supposed that in *Rashdall* v. *Ford* (5) there was a "direct representation," which did not exist here; but the words of a representation, even though in themselves indirect, may be such, and they are so here, as to produce on the mind of a third person the most direct effect.

(1) Law Rep. 7 Ch. Ap. 802.
(2) Law Rep. 6 Q. B. 276.
(3) 5 De G. M. & G. 76. 18 Jur. 524
(4) 3 De G. & J. 501; 28 L. J. (Ch.) 167. 5 Jur. N. S. 231.
(5) Law Rep. 2 Eq. 750.
(6) Law Rep. 7 Ch. Ap. 802.

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If that effect is produced, the words that produce it are in themselves of little consequence. The bankers are therefore entitled to recover from the directors the amount of the cheques. Here, too, in the dealings with the bankers the shares were treated as paid-up shares, and they were accepted in the belief that that character really belonged to them. It was not so, and it is clear that the bankers are entitled to have the representation made good, or to be relieved from a liability which they had unconsciously undertaken on the faith of something that proved to be utterly incorrect.

Sir *J. Karslake*, Q.C., Mr. *Fry*, Q.C., and Mr. *Speed*, were for the Respondents.

THE LORD CHANCELLOR (at the end of the argument for the Appellants) asked the Respondents' Counsel if they had any objection to urge against such an alteration in the decree as would relieve the bankers from any liability on the shares deposited with them and registered in their names. The alteration would be to this effect: "It is ordered that the Defendants do join and concur in all acts necessary for cancelling the names of the Plaintiffs *Beattie* and *Barton* in the register of shareholders of the railway company, and thereupon it is ordered that the Plaintiffs' bill do stand dismissed out of this Court with costs."

The Respondents' counsel said they had no objection to this.

THE LORD CHANCELLOR (Lord *Cairns*) then moved the judgment of the House:—

My Lords, this case, which in its progress has become enveloped in a large quantity of paper, in reality raises questions which are very small in themselves, and, as appears to me, very easily answered; although they involve, upon the one side and upon the other, a considerable sum in point of money.

My Lords, the bill in the Court of Chancery below was filed by the public officers or trustees of the *Union Bank of London* against the *Rickmansworth Railway Company* and against its directors and its secretary. Putting aside that which was a very minor part of the case, the question whether the names of the Plaintiffs should, as regards the future, be removed from the list of shareholders of

the company, the real question which was in controversy in the suit was the question of the personal liability of the directors of the company to the plaintiffs. That personal liability was sought to be fixed upon the directors by two arguments; the first arising out of the manner in which the cheques of the railway company upon its bankers, the *Union Bank*, were drawn; and the second arising out of a narrative connected with the handing over and transfer to the *Union Bank* and its officers of certain preference shares and debentures of the company.

Now, my Lords, with regard to the first of these questions, the question of the liability in respect of the cheques which had been signed by the directors, the equity which was alleged by the bill appears to have been of somewhat of an afterthought, and to have been inserted in the bill by amendment, for the only part of the bill that I can find referring to that question is to be found in a paragraph which from its numbering appears to have been inserted by amendment, namely No. 49*a*. It is this: "All the moneys which the bank advanced and paid were paid and advanced at the request of the Defendants, the directors, and as they directed, and the bank honoured and paid the cheques of any two of the directors, countersigned by the secretary, by virtue of a written authority of the 4th of July, 1860, signed by three of them and assented to by all the others, and on the faith that the company or its directors would repay the same and interest, and the Plaintiffs submit that the Defendants the directors are personally responsible for all such of the said moneys as they were not authorized to borrow or in respect of which they had no power to bind the company, with interest." The allegation is that the bank honoured "the cheques of any two of the directors, countersigned by the secretary, by virtue of a written authority of the 4th of July, 1860, signed by three of them, and assented to by all the others, and on the faith that the company or its directors would repay the same."

My Lords, what was this authority, upon the faith of which it is said that these cheques were paid? It is a very short letter addressed to the directors of the *Union Bank of London* or their manager at the *Temple Bar* branch:—[His Lordship read the letters, see *ante*, p. 103.]

My Lords, so far as this authority is concerned, of course it

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would only be a matter affecting the three directors who signed it, *Cary*, *Capel*, and *Warwick*. But what does the authority amount to? At that time, there is no dispute, that the account of the railway company with the bankers had not been overdrawn. In point of fact the bankers had a balance in their hands belonging to the company. It appears to me that the letter is nothing more than a simple intimation of a most business-like kind transmitted to the bankers of the company, as to the manner in which they were to expect cheques emanating from the company to be signed—an intimation to them that unless the cheques were signed in this way, they were not to treat them as the properly authorized cheques of the company, and were not to honour them. There is, in this document, no undertaking whatever on the part of any director of the company that he will be answerable for the debts of the company, or that if these cheques are not paid by the company he himself will pay them. In point of fact, the account of the company with the bank at that time not being overdrawn, this authority, as I read it, is nothing more than a statement as to how cheques were to be drawn upon that balance which was in existence at the bank. So far as this authority is concerned, it was not in any way a direction to the bank to honour cheques after the whole of that balance had been withdrawn.

But then, my Lords, the Appellants at your Lordships' Bar go on from that and say, even supposing that this is not an authority during all time to honour cheques, whether there was a balance or not at the bankers, still after the whole of the balance was exhausted, cheques did in fact continue to be drawn upon the bank and to be honoured by the bank, and for those cheques the directors are personally liable, because, it is said, every cheque so drawn (that is, drawn after the balance was exhausted) must be taken to have been a representation of some kind, (it is difficult to say what,) by the directors to the bank, by virtue of which they become personally liable. My Lords, if cheques are from time to time drawn on a bank on behalf of a railway company, the bankers are perfectly aware whether they have got in their hands a balance of the company, or whether they have not. If they have in their hands a balance of the company, it is their duty to honour the cheques, provided only they are drawn in the manner that has

been specified. If, on the other hand, they have not a balance in their hands belonging to the railway company, it is for them to consider whether they will run the risk of allowing the account to be overdrawn, and whether, if they do so, the law will allow them to recover as upon a loan, or as upon an advance of money, against the railway company. Those are matters which it is for the bankers, and for them alone, to consider, and I can see nothing in the fact that cheques are drawn and signed by directors of a railway company, upon a bank, which knows its own affairs, and knows the state of the balances of its customers, that should in any way make those directors of the railway company personally liable.

My Lords, we were referred by the learned counsel for the Appellants to a case before the Privy Council which was said to be relevant to their argument upon this point; but I cannot find in that case anything whatever which supports the argument on behalf of the Appellants. That case, namely, the case of *Cherry* v. *Bank of Australasia* (1), was an extremely simple one. Two directors of a company in a colony, who were not a majority, and who, therefore, according to the company's act, had no right to bind it, transmitted to the bankers a letter, in which they stated that a particular person had been legally appointed manager of the company, and was authorized to draw cheques. At the time when this letter was transmitted, in point of fact, the account of the company was overdrawn at the bankers, and the manager had not been legally appointed. It was a statement false in fact and erroneous in law, that he had authority to draw cheques upon the bankers, or to bind the company. The Court therefore proceeded, and, as I humbly venture to think, rightly proceeded, upon the well-known principle of law, that if a false statement is made, false to the knowledge of the person making it, of a fact which is at the time practically ascertained one way or the other, and that statement is acted upon, and was meant to be acted upon, by others, the persons who acted upon and were misled by that false statement, have a remedy against the person who made it. My Lords, that in no way applies to the present case. In the authority to honour cheques dated the 4th of July, 1860, there is nothing which was in any way a misrepresentation or error. In the fact that

(1) Law Rep. 3 Pr. Co. 24.

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cheques did from time to time continue to be drawn after the balance was exhausted, there was no misrepresentation, for the bankers knew all the facts. There was no error, because a cheque of that kind does not contain upon the face of it, or in reality, any assertion of any fact.

My Lords, I pass, with those observations, from that part of the case, and I now come to the second head of equity—that connected with the preference shares and the debentures to which I have referred. It will be necessary that I should give your Lordships a slightly prolonged narrative as to the way in which that question arises, and although the letters must to some extent be referred to, I think in one point of view it is satisfactory that the whole question rests, as it appears to me, upon the construction of those letters. Your Lordships need not be embarrassed by any of the evidence in the case apart from the letters, for I cannot find that anything was said or done in the transactions between these different parties except that which has been put in writing in the correspondence to which I am going to refer.

I will ask your Lordships to commence with a letter—a very important one, as it seems to me—of the 19th of December, 1862. At that time the *Rickmansworth Company* had stood upon its original Act of Parliament; it had not at that time obtained an Act, which it obtained in the year 1863, authorizing the issue of some preference shares and the borrowing on debentures of a certain additional sum of money. The letter of the 19th of December, 1862, is from the manager of the bank to the railway company, that is to say, to Lord *Ebury*, as one of the directors of the railway company. It is the second part of the letter to which I refer: "I have farther to request that the unissued shares"—that is, shares unissued under the first Act, with which your Lordships have now nothing to do—"be given to the bank as collateral security, and that your board will undertake to hand to the bank such preference shares and debentures as you may obtain authority to raise in next session of Parliament."

Now, my Lords, what did this letter mean? I pray your Lordships to observe, in the first place, that this is not the case of a railway company or of railway directors coming to a bank and offering a security which they describe in a particular way. It is

the case of the manager of a bank describing for himself the security which he chooses to ask for; and I ask your Lordships whether it is possible to read this letter of the manager of the bank as a letter which means that he expected to receive shares which should be paid up *aliunde*, paid up by the directors of the railway company, and should be assigned as paid-up shares, and that he should receive debentures upon which somebody else had advanced the whole amount of money, and which were to be assigned to the bank as debentures, carrying with them the evidence that money to the full amount had been already advanced to the railway company. Such an interpretation would be contrary to the plain and obvious meaning of the words. What the manager asks is this—that which is perfectly well known and not at all uncommon in matters of this kind—that the bank, which was largely under advance to the railway company, should become the *dominus* of the whole issue which was expected to be authorized by Parliament, whether of shares or of debentures. The words are: "I request that your board will undertake to hand to the bank such preference shares and debentures as you may obtain authority to raise."

Well now, my Lords, I turn to the answer to that request: "My directors," says the secretary or an officer of the railway company, writing to the manager of the bank, "desire me to assure you that all unissued, and all preference shares and debentures to be created by a bill about being introduced into Parliament, shall be handed to your bank in a sufficient amount to cover the balance now due upon the account of the company." That was the request of the bank, and that was the undertaking of the company. Your Lordships will find that letter of the 19th of December, 1862, referred to more than once afterwards.

I pass on now to another proceeding of the same kind. It appears that upon reflection, and upon consultation between the bankers and their solicitors, they were anxious to obtain a promise in a somewhat different form from the railway company; and Messrs. *Benham* and *Tindall* write thus to the officer of the railway company on the 23rd of February, 1863: "Counsel has advised that we should require the chairman and directors to give their undertaking to use their best endeavours in their individual capacities to obtain for the bank what your letter of the 19th of

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December, 1862, promises. We have, therefore, to ask, if you see no objection to the form in which the undertaking is drawn," to have it stamped and to get it signed by the chairman and directors of the company. The draft of the proposed undertaking was inclosed. I will not read it all, but your Lordships will see that it would, in effect, have bound the chairman and directors of the railway company to undertake personally, jointly, and severally to use their best endeavours "to cause to be handed to and deposited with, as security to the said bank, all the present unissued shares of the said company, and all preference shares and debentures to be created by a bill introduced into Parliament, intituled a bill to grant further powers to the *Watford and Rickmansworth Railway Company*, to a sufficient amount as, fully paid up, to cover the amount due upon such cheques, with interest and commission thereon at the date of such deposit, and also with full power to the bank to realise such shares, debentures, and other securities at their free pleasure, and to apply the proceeds in liquidation," with a proviso that such security should not be realised below par without giving notice to the company.

Now, my Lords, was that draft, which it appears to me would have varied materially the contract in the preceding letters, accepted, or agreed to, on behalf of the railway company? I took the liberty of asking the question of the Counsel at the Bar, and your Lordships were referred to a passage in an answer of the directors. My Lords, that passage seems to me to shew that, in place of being accepted or agreed to, the draft was not accepted by the directors of the railway company. In the tenth paragraph of the answer, the directors, answering in another suit, said: "The said draft undertaking was never in fact signed by us, these Defendants, the directors, or by any of us, but its form, as so altered, was never, to the best of our belief, objected to on behalf of the said *Union Bank*," and, no doubt they would not object to it, for it was their own document. "Notwithstanding this omission to sign the undertaking, it was always considered by us, these Defendants, the directors, that we were bound on behalf of the said company, and in pursuance of the assurance given in the said letter of the said Mr. *Jeyes*, dated the 19th of December, 1862"—to do what?—"effectually to vest all the

unissued shares of the company in the bank or its nominee;" that is, the shares under the first Act of Parliament, which are now out of the case. There is, therefore, here no statement whatever that the draft was ever accepted or acted upon, or was taken by the railway company or its directors as binding upon them.

Then, let us pass on to another matter. It appears that on the 22nd of January, 1864, the bank manager writes to the railway company. Your Lordships will observe that we thus pass over the whole of the year 1863, and over the time during which the second Act of Parliament was passed. That second Act of Parliament having passed, the bank manager writes, on the 22nd of January, 1864: "After several attempts, I gave the matter up for the time, and relying upon the promises of the board that the bank debt should be the first charge upon the preference shares and debentures about to be raised by a bill then in Parliament, I have been anxiously waiting some communication for months past in fulfilment of this promise." That must be the promise contained in the letter of the 19th of December, 1862, for no other had been given. In answer to that, the secretary of the company acknowledges the receipt of the letter on the 23rd of January, and he says that he has at once communicated with the chairman and directors of the company. And after that (for some intervening letters are unimportant), the manager of the bank writes thus, on the 27th of February: "In reply to your favour of yesterday, I beg to inform you that I cannot pay the interest on the *Watford and Rickmansworth Railway* debentures, due the 1st of March, without I have the personal undertaking of the directors to the bank for repayment of the same."

My Lords, let us see what happened a little later on. After some intervening correspondence, in the course of which it is not unimportant to remember that the bankers did obtain the personal guarantie of the directors, confessedly such, for the payment of this interest, and we find that on the 8th of December, 1864, the manager of the bank writes this very important letter: "The delay in settling the large amount due to this bank causes my directors considerable uneasiness, and I have been instructed to apply to you" (that is, to the secretary of the railway company) "for a transfer of at least £20,000 of the unissued preference

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shares." Your Lordships will observe that what he is applying for is not for £20,000 worth of paid-up shares, or of shares which had been taken by other persons, and been paid upon by those other persons, but for a transfer, which must of course mean a transfer to the bank, of £20,000 worth of unissued preference shares, upon which, of necessity, nothing had been paid, "into the joint names of myself and *John Arthur Barton*, Esq., of 2, *Princes Street, Mansion House*, to be held by the bank as collateral security." Now, if this had been done, and done in this form, undoubtedly the officers of the bank would have taken these shares with all their liabilities. "And I am to request at the same time that your unissued debentures are to be transferred to the same names, you undertaking to do this when you are in a position to issue them."

My Lords, I was certainly surprised to hear it said at the Bar that Mr. *Beattie* was not aware of the manner in which the company could legally issue these debentures. What did Mr. *Beattie* mean when he spoke of the railway company being "in a position to issue" debentures which were authorized by the Act, which authorized the issue of preference shares? There is only one circumstance which puts a railway company in a position to issue debentures, and that is having a certain amount of the share capital of the company, with reference to which those debentures are to be issued, subscribed for and paid up. It appears to me, my Lords, that this is a letter which shews in the clearest way, that what the bank manager was asking for was an immediate handing over, or, as he calls it, a transfer, of all the preference shares, and he says that then he would be satisfied that, as those shares got out among the public and became paid upon, he should have the debentures also, when the company became in a position to issue them.

Then, my Lords, you find the answer to that letter. I ought to remind your Lordships that we were referred to a minute made by the railway directors, and which was made in consequence of the last letter which I have read; but I prefer not to take the minute, which is really the language of the company speaking to itself, but the letter which was written to the bank manager on the 20th of December, 1864. That letter runs thus:

"Dear Sir,—I submitted your letter of the 8th instant to the directors, and I am instructed to inform you that they will have no objection to carry out the arrangement you suggest, and have instructed me to allot the shares you name to Mr. *Barton* and yourself, to be held by you as collateral security for the debt owing to the bank." My Lords, I submit here that it is impossible for persons engaged in business, and conversant with the way in which the affairs of banks are conducted, to allege, after receiving, without remonstrance, a letter of this kind, that they considered that they were not to be grantees of these shares, but to have these shares as shares upon which the persons to whom they were first given had paid up the whole of the capital.

Your Lordships will find that, afterwards, on the 3rd of January, 1865, the formal resolutions for the issue of preference shares having been come to, the secretary writes to the bank manager in these terms: "I have now to acquaint you that the issue of the new preference shares having been finally sanctioned at the half-yearly meeting of the company held on the 23rd ult., I am now prepared to place the shares and debentures named in your letter in your possession as collateral security to the bank for the debt owing, pending some more definite, and, I trust, speedy arrangement for the liquidation of that debt. I propose, as the course usually adopted in such cases, to register the shares, &c., in the names of two of the directors of the company, who will execute a transfer of them to you and Mr. *Barton* on a mutual understanding that they are to be held by you only as collateral security to the bank."

My Lords, whatever form the shares may appear to be in, whatever form the debentures may appear to be in, the transaction upon this letter is perfectly manifest. The bankers were to have in their possession, pending realization of shares and of debentures, the whole of the shares and the whole of the debentures. It would be for the railway company, for its own benefit as well as for the benefit of the bank, to pass those shares as rapidly as they could into the market—to have them taken up and the capital paid as far as it could be paid upon them; but the bankers, having the shares, would be enabled to have the control over that operation, and to take care that any capital coming by virtue of

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those shares to the company should pass into their hands and be available for the liquidation of their debt. In like manner, also, the bankers would be able, when the proper amount of capital was subscribed for, and paid upon, in respect of the shares, to pass the debentures also into the market with the proper magisterial certificate of the payment of the necessary amount of capital. In this way they would have the control of the whole of the issue, and thus be able to prevent the railway company from passing the shares or the debentures into any other hands.

My Lords, the manager does not repudiate that letter, but, on the 9th of January, he says: "In reply to your letters of the 3rd and 9th instant, I beg to say I am quite prepared to accept the shares and debentures as collateral security pending your disposal of them." Then the whole narrative is ended by the secretary to the company writing to the manager on the 18th of January, "I have now the pleasure to forward you herewith the under-mentioned preference shares, certificates, and mortgage deeds standing in the names of Lord *Ebury* and Mr. *J. H. Dillon*, two of our directors, accompanied by deed of transfer executed by the above gentlemen in favour of yourself and Mr. *J. A. Barton*;" that being, in fact, all that was described by the manager of the bank as being the form in which these transactions were usually effected. But we have, as the origin and inception of the transaction, the original request of the bank, and the answer to and acceptance of that request, which explains clearly, at the beginning, what the character of the whole transaction was to be.

My Lords, that really exhausts the whole of the second part of the case. It appears to me that there is no pretence for saying that there was on the part of these directors any misrepresentation with reference to these preference shares or these debentures. The manager of the bank knew what he had asked for, and it appears to me that he got exactly the thing which he asked for, and consequently that it is much too late for the bank now to allege, founding itself upon the form of the preference shares and the debentures, that that form amounted to a representation on the part of the directors of the railway company, that in point of fact these shares had been allotted really and *bonâ fide* to other persons, and paid upon by those other persons, and that these

debentures had actually been issued for money or money's worth advanced by other persons to the company.

Now, my Lords, I have to add to what I have already said one other observation; I should be quite satisfied to rest the case where I have placed it, but after all, the whole equity alleged by these Appellants is founded upon this—that there was some right which the bank expected to have, might have had, and ought to have had, of asserting against the railway directors its claim to the recovery of the debt which was due to the bank from the railway company. The equity is put thus, that the directors of the railway company have misled the Plaintiffs into thinking that they had a personal liability of the railway directors, when, in point of fact, they had not a legal personal liability of the railway directors. But, my Lords, is there any foundation for that allegation? I find in the bill of the bank itself this statement, that the sum due from the company to the bank amounted in March, 1865, to upwards of £30,000, and frequent applications for its payment having been unavailing, the bank commenced an action in the Court of Common Pleas against the railway company for recovery of the sum owing and interest, and obtained judgment for £32,408 6*s.* 9*d.*—that of that amount the sum of £9436 8*s.* 4*d.* was paid by some of the directors on behalf of the company in part satisfaction of the judgment debt—that £23,000 still remaining due to the bank, a writ of *elegit* was, on the 8th of January, 1866, issued out of the Court of Common Pleas against the railway company for the sum of £23,334 3*s.* 9*d.*, and on the same day lodged with the sheriff for execution. I cannot help pausing there for a moment for the purpose of observing to your Lordships how very much better a position the bankers are in by virtue of their judgment than they would have been in upon the debentures, because the debentures were not payable until the 1st of March, 1870, whereas they asked for and obtained their judgment in the year 1866. The sheriff proceeded to execute it, and he took certain girders and chattels of a certain value—they are described as being of small value, but that is immaterial—£212 18*s.* 4*d.* arose from the sale of those girders and other chattels. It is then stated that a bill was filed against the company and the *London and North Western Railway Company* for a

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declaration that the bankers as *elegit* creditors were entitled to be paid the sum payable by the *London and North Western Railway Company* under their agreement for working the line. Therefore, my Lords, the bankers appear to have asserted, and to have asserted successfully, their rights as creditors of the railway company—to have obtained judgment and an execution, and everything which could be obtained in that way, and how is it possible for them, my Lords, in this proceeding, in the face of that statement, to allege that they have, by the conduct of the Respondents here, been deprived of some right of action which they otherwise would have had against the railway directors if the conduct of the Respondents had been different from what it has been?

My Lords, it appears to me that the conclusion arrived at by the Lords Justices upon this case was, upon all the main points of the case, entirely correct, but inasmuch as in respect of these shares the officers of the bank have been placed as shareholders upon the register, and inasmuch as the decree of the Vice-Chancellor has declared that their names should be removed from the register (I assume upon the principle that they were to be there merely in respect of a contract for security of debt, and that there being no longer any question of realising their debt by means of the transfer of shares, therefore their names should be taken off the register), and inasmuch as that decree has not been appealed against, it remains standing notwithstanding the decree of the Lords Justices. It appears to me that a question may arise, and probably will arise, whether that decree can be made available by the bank, unless it is supplemented by a personal order against the officers of the railway company to do that which the decree declares ought to be done. My Lords, I think that any alterations of the decree, made for the purpose of effecting this object, should not in any way affect the question of the costs of the suit under appeal, and what I suggest to your Lordships to do is, to vary or alter the decree of the Lords Justices by declaring before you arrive at the words dismissing the bill, "that the Defendants do join and concur in all acts necessary for cancelling the entry of the names of the Plaintiffs *Beattie* and *Barton* in the register of shareholders of the said railway company, and thereupon it is ordered" (as the decree already runs) "that the bill be dismissed with costs;" and then

order upon this appeal, "that the decree be in all other respects affirmed, and that the Appellants pay the costs of this appeal." My Lords, I humbly move your Lordships that the order be altered in that form.

LORD CHELMSFORD:—

My Lords, the case of the Appellants in their printed reasons is based entirely upon the misrepresentation of the directors, both as to the overdrawn cheques and as to the preference shares and debentures agreed to be given to the bank as security for the repayment of their advances.

It was argued on the part of the Appellants, that as to the cheques the written authority of the 4th of July, 1860, amounted to a representation that the company had given the Respondents, the directors, authority to bind them, by drawing cheques upon the bank, but not of overdrawing their account, and that each cheque drawn by the directors when the company had no funds in the bank, was a misrepresentation which rendered the directors personally liable for the amount. It appears to me, that the effect of that authority is entirely misconceived—it is in these terms:—[His Lordship read it, see *ante*, p. 103.] This is only the ordinary form of a notice. When a company is about to open an account with a bank it is necessary that the bankers should be informed by whom, and in what manner, the cheques to be honoured are to be signed. What does this authority do more than that? It is not limited to the honouring of cheques drawn within the funds belonging to the company, but applies to cheques generally. What room is there for the argument that when the account is overdrawn by a cheque, there is a misrepresentation?

No cheque can be drawn without an order in each particular case. It is said that the order is the order, not of the company but of the directors; but the directors have the management of the pecuniary and other affairs of the company, and are not restricted from incurring debts for the purpose of the company, by overdrawing the account. In this case, the bank could have protected itself by refusing to honour the cheques. It is said that the authority to draw gave the directors no power to overdraw the account. But if the directors had no authority to draw the cheques, they were

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not the cheques of the company, and this must have been known to the bankers. There was, therefore, no authority to pay them, and they paid them in their own wrong as the cheques of the company. It is a strong circumstance, which was admitted on the part of the counsel for the Appellants, that there is no case to be found in the books where directors have been made personally responsible for overdrawing an account of a company with their bank.

The argument at one time took the direction that the authority to honour cheques amounted to an undertaking on the part of the directors that for any of the debt incurred by the drawing they would be personally responsible. But independently of the document itself not bearing that construction, the Appellants could hardly have thought it could have that effect, for upon three occasions when they made advances to the company to the extent of upwards of £7000, they required and obtained the guarantie of some of the directors. All the moneys advanced upon the cheques of the directors are admitted to have been applied to the purposes of the company. The bankers in their bill state this: "The said *Union Bank of London* were duly appointed and became the bankers of the company, and at their request the directors paid various sums of money to, and on behalf of, the company and for the purposes of the company, and all such moneys were applied for such purposes accordingly, and the said directors and the company having, in the month of December, 1862, become largely indebted to the said bankers, the plaintiff *John Beattie*, as the manager of the *Temple Bar* branch of the said bank, required payment of the amount due." And then, in March, 1865, the bankers sued the company and the directors to recover the amount of their advances. The directors who had guaranteed advances paid the amount of those guaranties, and the bankers recovered judgment against the company for the money paid upon the cheques, upon which they issued an *elegit* and obtained a small sum, but it was all that the company's chattels would realise. Upon these facts, my Lords, I do not see how it is possible that the directors can be made personally liable for the money advanced upon cheques at the time when the account of the company was overdrawn.

The second head of claim, founded, like the former, upon alleged misrepresentation, is, with respect to the preference shares and

debentures, transferred to the bankers as security for their advances and payments. As to these, it is alleged that the directors of the railway company represented them as validly issued shares and debentures, and that not being so, they are bound to the bank, either to make good the representations, or personally to indemnify the bank against the consequences arising from them. As to this part of the case the whole of the alleged misrepresentation is and must be founded upon the correspondence between the parties. The first letter which opened the negotiation is of course of very great importance, but, as my noble and learned friend on the woolsack has observed, it was not an offer on the part of the company to give security to the bankers for the moneys they were to advance, but it was a request of the bankers themselves to have security, and the security which was required was stated thus: "I have farther to request that the unissued shares be given to the bank as collateral security, and that your board will undertake to hand to the bank such preference shares and debentures as you may obtain the authority to raise in next session of Parliament." What they stipulated for as to the preference shares and debentures was merely that when issued they should be handed over. It appears to me that the meaning of this request, and all that the bankers require, is that the preference shares and debentures should be placed with them, so as to give them the control over those shares, and enable them to issue those preference shares and debentures and receive the money upon them.

Some stress was laid upon a proposed undertaking, which, upon the advice of Counsel, the solicitor of the bank proposed to the company's solicitor. Now, this undertaking was never signed nor ever expressly agreed to, but it is said that the directors impliedly agreed to it, and their answer is referred to. It appears in the printed papers as an exhibit to an affidavit of *Beattie*. What they say is this: "The said draft undertaking was never, in fact, signed by us, these Defendants, the directors, or by any of us, but its form, as so altered, was never, to the best of our belief, objected to on behalf of the said *Union Bank*. Notwithstanding this omission to sign the undertaking, it was always considered by us, these Defendants, the directors, that we were bound on behalf of the said company, and in pursuance of the assurance given in the said

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letter of the said Mr. *Jeyes*, dated the 19th of December, 1862," to do what? "effectually to vest all the unissued shares of the company in the bank or its nominee" exactly in accordance with the terms of the letter of the 19th of December, 1862? That was all that the bank required, and that was all that the railway company agreed to do. Of course this leaves the question to rest entirely upon the terms of that letter of the 19th of December.

The letter of *Beattie* asking for the transfer of preference shares and debentures when issued is perfectly consistent with the Respondents' understanding of that letter as it appears from their answer. *Beattie* writes on the 8th of December: "The delay in settling the large amount due to this bank causes my directors considerable uneasiness, and I have been directed to apply to you for a transfer of at least £20,000 of the unissued preference shares into the joint names of myself and of *John Arthur Barton*, Esquire, to be held for the bank as collateral security, and I am to request at the same time that your unissued debentures are to be transferred to the same names, you undertaking to do this when you are in a position to issue them." Some time afterwards (on the 3rd of January, 1865), Mr. *Forbes*, the secretary of the company, writes to Mr. *Beattie*, the manager of the bank: "I am now prepared to place the shares and debentures named in your letter in your possession as collateral security to the bank for the debt owing, pending some more definite, and, I trust, speedy arrangement for the liquidation of that debt. I propose, as the course usually adopted in such cases, to register the shares, &c., in the names of the two directors of the company, who will execute a transfer of them to you and Mr. *Barton*, on a mutual understanding that they are to be held by you only as collateral security to the bank." And then a letter is written by *Forbes* to *Beattie*, saying: "The shares and debentures are at your disposal, and I shall be glad to conclude the arrangement." *Beattie* writes on the 9th of January: "In reply to your letters of the 3rd and 9th inst., I beg to say that I am quite prepared to accept the shares and debentures as collateral security pending your disposal of them."

Now, my Lords, what is there through the whole of the documents and correspondence to shew that it was ever agreed that

the bankers were to have paid-up shares and debentures, or what is there to shew that they have any evidence on which to convict the directors of any misrepresentation? It is said that the directors, when they handed over the debentures, knew that they were not valid because they had no magisterial certificate, which, under the special Act, could not be obtained until the shares were subscribed and paid upon: but Mr. *Beattie* must have known as well as the directors that the shares were not subscribed and paid upon, and therefore that no debentures could legally be issued. The preference shares had been transferred into the names of *Beattie* and *Barton*, and the debentures were transferred to the same names, as requested in the letter of the 8th of December, 1864.

My Lords, it appears to me that the bankers have got all the security they are entitled to. I think that the decree of the Lords Justices ought to be affirmed, and I entirely agree in the motion which has been made by my noble and learned friend.

LORD HATHERLEY:—

My Lords, I am also of the same opinion. It appears to me to be quite clear, on a careful perusal of the correspondence between the parties to this case, from which alone we can derive information, there being no trustworthy evidence of any parol communications on the subject, that the bankers knew perfectly well the course that matters were taking as between them and this company with respect to the advances from time to time made by the bank. The Appellants, in the very inception of the matter, took care—wisely and prudently, no doubt, on their part—when the account from time to time was in a position which they thought required it, to exact a personal guarantie from the directors of the company. The very circumstance of their so doing would in itself strongly tend to lead one to the conclusion, were there any doubt upon the face of the correspondence, that the true interpretation would be that, where the security was intended to be of that personal character, it was asked for, and, as we have seen, it was given.

Now, my Lords, with regard to the very inception of this whole matter, this is the most singular case I have ever known brought

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before a Court of Equity, particularly looking to the manner in which the whole of this large claim has been launched by means of one of the commonest and most ordinary documents by which a company, or person who does not, or cannot, from his circumstances, draw cheques upon his own account, informs his bankers by whom those cheques will be drawn and whose cheques they are to honour. The company in this case cannot put its corporate seal to all the cheques that may be required to be drawn upon the bankers. The Respondents had to inform the bank in what way the cheques upon a certain amount of money standing in the bankers' hands (which was the case at the time when this transaction took place) were to be drawn. For that purpose they wrote this letter:—[His Lordship read it.] It has been attempted upon that to say that there is here a warrant that whenever any cheque of the company is signed by two directors and countersigned by the secretary, be there assets or be there not at the bank which ought to answer that cheque, the bank is authorized by this letter to infer a guarantie on the part of these persons giving this authority that the over-drawn drafts shall at all times be satisfied and guaranteed by the directors.

It is certainly a very startling proposition, and one answer only could be given to the question which was asked by my noble and learned friend on the woolsack—whether any instance is to be found in the books (and we have had all the authorities which could possibly have any bearing upon the subject brought before us) of persons being made liable for an overdraft made by the directors of a company, upon the ground of their having informed bankers in what form the cheques were to be drawn by the directors of the company, or upon the other ground which was alleged here, namely, that the persons drawing the cheques by that mere fact intimated to the bank that they had assets in their hands sufficient to answer all those drafts on the bank, although there were no such assets in the hands of the bank upon which such cheques were drawn. The answer was in the negative. I should have been very much surprised if such a case could have been found. The cases, I am sorry to say, are innumerable, of companies in difficulties, and the cases have also been very frequent of companies in difficulties with very wealthy directors, and yet

it never has been attempted in any case (far less successfully attempted) to fix the directors with a representation that there were assets of the company sufficient to answer the cheques, merely because the cheques had been drawn and the bank had taken upon itself to answer them.

Just observe, my Lords, the caution of the bankers at the commencement of these proceedings (unhappily for themselves they were not equally cautious afterwards), soon after the account was opened and the direction to honour cheques given. That being on the 4th of July, 1860, in the very next document, in the letter written on the 12th of March, 1861, the bankers ask that the directors personally shall guarantee to them a sum of £6000, which is to be carried to the credit of the banking account of the company, and which will, of course, then be naturally drawn upon by cheques signed as they were in the first instance authorized to be signed. That document runs thus: "To the Directors of the *Union Bank, London, Temple Bar.*—Gentlemen,—In consideration of your advancing the sum of £6000 to the *Watford and Rickmansworth Railway Company*, in anticipation of calls and funds, we hereby undertake that the said sum of £6000 shall be repaid you within six months from the date of the advance from the calls due on shares of the company. The interest on the said advance to be charged at the rate of 1 per cent. above the minimum rate for the time being of the *Bank of England.*" That is signed by the chairman and three of the directors, and it might well be said to be an undertaking and guarantie on their part.

My Lords, farther than that we find that when the bankers, after allowing the account of the company to be largely overdrawn, are called upon to make farther payments, they declined to make those payments upon the drafts of the three directors, and asked to have a separate guarantie from individual directors that they will pay if the company should not. That the bankers, therefore, perfectly understood their position is quite apparent; and as to any deception being practised upon them by the directors in this case by means of the representations made, as it is alleged, as to the assets of the company, we find in one case that even for such a small sum as £130, and for a still smaller sum, I think, in another case, they required a personal guarantie from the directors before

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they would make any payment, knowing full well that they had no such guarantie to stand upon without a fresh undertaking, and not dreaming at that time of setting up this common and ordinary instrument, merely informing them how cheques would be drawn, as such a guarantie.

I apprehend, my Lords, that that part of the case of the bank as to the overdrawing entirely fails; because if you ask who had notice and who had not, of the state of things in which these cheques were drawn, the answer can only be one. The bankers knew perfectly well when the account of the company was overdrawn, and it was in their breast at any time and every time when the cheques came, not to honour them. They were not bound to honour cheques on an overdrawn account. The directors individually would be placed certainly in a very fearful position if it was to be held that each time they signed a cheque they were supposed to import into that signature of the cheque, drawn by them as they conceived by virtue of their office, an undertaking that there would be funds at the disposal of the company to meet the cheque whenever the bank chose to pay it. The directors individually were very far from having a knowledge of the exact state of the assets of the company, and they in such a case would necessarily have had to investigate the state of those assets upon each occasion of a cheque being drawn. The bankers, on the other hand, were perfectly well able to protect themselves, not being bound to pay a single cheque when the account was overdrawn without taking guaranties, which, in numerous instances that are to be found in these papers, they did take.

Now, my Lords, as to the other part of the transaction, I think, after what has been said, it is scarcely necessary for me to dwell at any length upon it. I will, however, just mention the view I take of it. It seems to me that from the very first the application made by the bankers was to have the control of the preference shares, which, by the new Act of 1863, the directors were authorized to issue, and to have the control of the debentures which, when a certain amount of the preference shares had been paid up, and a magistrate's certificate had been obtained, the directors were also to have the power to issue; and to have that control by means in the first instance, as they ask, of an allotment, for they ask to

have a transfer made to the two officers of the bank, the answer to which is: we will "allot" you (as you express it) shares as you ask for them. They afterwards feel some difficulty, and, perhaps, some danger, in taking that mode of procedure; and then they have some farther communication with the secretary of the company; and then the secretary says, Well, we will take the course which is usual in these cases, we will transfer the shares first into the names of two of our directors (evidently meaning any two, and not Lord *Ebury* and Mr. *Dillon* individually), because we owe the money, and we will pay by that course of procedure. He says: We will take the usual course in such cases of transferring into the names of any two of our directors whom it may happen to be convenient to transfer to; and then they, having had that transfer, shall transfer again to you. It was impossible for the bankers to suppose that that meant that they were to have shares completely and actually paid up, when in the first place they had asked simply for an allotment; and, secondly, they accepted this mode of proceeding, which is represented to be the common and ordinary mode of procedure, as putting the thing in the right form, the bank being perfectly aware how and why that form had been adopted.

Then, my Lords, as regards the debentures, they had in like manner, in a previous letter (which was commented upon by my noble and learned friend on the woolsack), in the origination of this matter said: You shall give us these preference shares and debentures "whenever you are in a position to issue them," perfectly well knowing what the conditions upon which they could be issued were, knowing that the debentures were not issuable at once, but that they were issuable from time to time as the shares became subscribed for and paid upon. The preference shares would be issued from time to time, as occasion might serve; and the debentures could only be issued in compliance with the Act of Parliament, which it is impossible to suppose from the correspondence (or even without it) that Mr. *Beattie*, the manager of the bank, was ignorant of. The bankers have got, as it appears to me, all that they supposed they had,—I cannot find a single fact that was concealed or was misrepresented to them. As was pointed out to us by Counsel, they would see an apparent transfer to Lord *Ebury* and Mr. *Dillon*, which was not to be the ultimate state of

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the transaction, but as to that, they were informed that it was to be done in the usual way, as it was called. They had debentures which expressed money to have been paid by some parties on the face of them, but which they perfectly well knew could not have been issued with the magistrates' certificate up to that time, inasmuch as those preference shares, or a large proportion of them, were held by themselves, and they perfectly well knew that they were not paid upon, and had not been paid upon. That being so, the transaction appears to me to have been as completely known to the one side as to the other throughout the whole of this business.

My Lords, the authorities which were cited (I am not going to pursue them in any detail, because one observation applies to each and all) come to this—that if a man misrepresents a fact, to that fact he is bound, if any other person, misled by such misrepresentation, acts upon it and thereby suffers damage. That is a principle of law long settled, and all the authorities turn upon that point. The only question your Lordships have to ask yourselves is, has there been any such misrepresentation of fact in this case. There does not seem to me to have been anything of that kind. This case is not to be compared to the case of a person who is represented to be the manager when he is no manager, and whose actions had been trusted to as manager when he was not really such. Nor is it to be compared to a case where persons represent themselves as authorized to borrow money for a building society when they have no such authority at all; or where persons represent themselves as authorized to borrow money as the trustees of a road, or for some purpose of that kind, when they have no such authority. Those who choose to make representations of that kind must stand by the representations they have made; but misrepresentation does not exist when each party is perfectly cognizant of the true state of affairs, as in this case.

I entirely concur, therefore, in the motion which has been made by my noble and learned friend.

LORD O'HAGAN:—

My Lords, I am of the same opinion. After the full statements of their reasons which have been given by the noble and learned Lords who have preceded me, I shall not say anything

except to indicate very shortly the grounds upon which I take this view of the matter.

It appears to me that the decision of the Lords Justices is entirely according, not only to the equity of the case, but to the precise rights of the parties as ascertained under their own hands in the correspondence. It appears to me that the judgment, which this House I hope will affirm, gives to the Appellants all that they ever bargained for. I cannot find from the beginning to the end of this case any mistake on the one side, or any misrepresentation on the other. I believe that there was no misrepresentation and no mistake. I think that fact distinguishes this case from all the cases which have been cited to us; and certainly from the case of *Cherry* v. *Bank of Australasia* (1) and the two other cases upon which the learned Vice-Chancellor founded his judgment. In this particular case I cannot conceive, when the document of the 4th of July, 1860, is looked at, that there is any pretence for saying there was any misrepresentation. It may be said that impliedly that document does make several representations. It represents the existence of a railway company; it represents that the persons who sign it are directors of that company; and it represents that those persons intend to issue cheques. It represents nothing more; and those representations are all precisely according to the facts.

Then, my Lords, when you come to the cheques, it does not appear to me that they carry the case at all farther. The cheques make no representation, and shew no undertaking at all. There is no undertaking that there shall be funds to answer those cheques. When we remember that the bankers throughout the whole of these transactions were as cognisant of the monetary condition of the railway company as the company itself, that they knew whether or no they had money to answer the cheques drawn upon them, I should say that they acted at their own peril, and made these advances without the undertaking which they might have got, and which, in particular instances, they did get, from the directors individually. Under these circumstances they must take the consequences and suffer the results. So much as regards the first part of the case.

(1) Law Rep. 3 Pr. Co. 24.

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Then, my Lords, as to the shares and debentures, it is not necessary for me to go into any details of the correspondence—it has been borne into my mind as the clear conclusion from the whole of it, that the bankers accepted those shares and debentures not as paid-up shares at all, not as debentures upon which money had been paid, but only as securities which they might hold against the current advances, and which they might at any time put into circulation in the market, and so get as much as would, upon the fully paid-up shares, answer all their demands and secure them from any liability. It appears to me that that is the effect of the whole correspondence; and looking at the whole of the correspondence, I am of opinion that the demand is, in fact, a mere afterthought. It appears to me to be perfectly plain that when the Appellants originally asked for the shares and debentures they did not mean paid-up shares or debentures upon which money had been paid. Take the letters between Mr. *Beattie* and Mr. *Jeyes*—you find Mr. *Beattie* in the first of his letters demanding what? Not fully paid-up shares at all, but unissued shares and debentures which thereafter might be brought into effect, plainly shewing that there was no contemplation in his mind at that time of shares which were paid up, or debentures which at that time were valuable. And we find Mr. *Jeyes* answering in exactly the same way. He says: We will comply with your demand as to the unissued shares and as to the debentures which are hereafter to be issued. When they come to enter into, or prepare, that unexecuted undertaking, to which reference has been made by one or two of my noble and learned friends, you find on the face of that undertaking that the undertaking is not to give paid-up shares, and not to be answerable as for paid-up shares, but the undertaking is simply that these directors will do their best to get the unissued shares handed over according to the contract. That is the whole of it. The words "paid-up shares" are used in that undertaking no doubt, the unexecuted undertaking, as I call it; but those words, where they are used, manifestly point to this, that the bank is to have the unissued shares and the debentures for the purpose of using them in such a way that, when enough has been got upon them as upon fully paid-up shares, the whole transaction between the parties will be settled absolutely.

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Therefore, my Lords, upon the whole of this case it appears to me to be perfectly plain that the bank is getting all that the bank ever contracted for. It only asked for unissued shares, and not for paid-up shares. It never asked for a general undertaking from the directors. Whenever it felt itself pressed with danger and difficulty, it did demand an undertaking, and when it did not, it must take the consequences. Upon these grounds, therefore, I am clearly of opinion that the judgment of the Lords Justices ought to be affirmed with the modification which has been suggested by my noble and learned friend on the woolsack.

Mr. *Swanston*:—Before the question is put to the House, will your Lordships allow me to make two slight observations upon the form of the order. One is, that your Lordships propose to direct that the Appellants are to pay the costs. Would your Lordships think it right to direct that that should only be done after the names have been removed? We anticipate great difficulty in getting that done. The second observation I have to make is this. The Respondents have thought fit to print a separate Appendix containing the amended bill which had been already printed in the Joint Appendix. I ask your Lordships to exclude that from the costs which your Lordships are about to direct the Appellants to pay.

THE LORD CHANCELLOR:—My Lords, it is not the habit of your Lordships' House to hear applications upon the subject of costs after a case has been decided. With regard to the first application of the learned counsel, it appears to me that it is quite unnecessary to delay the payment of the costs of the appeal until after the names have been taken off the register. The bill is not to be dismissed below until that has been done.

Decree appealed against affirmed, with variations; and Appellants to pay the costs of the appeal.

The following Order was afterwards entered on the Journals:—.

It is *Ordered* and *Adjudged*, by the Lords Spiritual and Temporal, in Parliament assembled, that

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the said decree or order of the Lords Justices of Court of Appeal in Chancery, of the 20th of July, 1872, complained of in the said appeal, be varied as follows, namely, by inserting after the words "And it is ordered," and before the words "that the Plaintiffs' bill do stand dismissed," the following words, namely, "that the Defendants do join and concur in all acts necessary for cancelling the entry of the names of the Plaintiffs *John Beattie* and *John Arthur Barton* in the register of shareholders of the said railway company, and thereupon it is ordered": And it is farther *Ordered* and *Adjudged*, that the said decree or order, subject to the above-mentioned variation, be, and the same is, hereby affirmed: And it is farther *Ordered*, that the Appellants do pay or cause to be paid to the said Respondents who have answered the said appeal the costs incurred by them in respect of the said appeal, the amount thereof to be certified by the Clerk of the Parliaments: And it is also farther *Ordered*, that the cause be remitted back to the Court of Chancery to do therein as shall be just, and consistent with this variation and judgment.

Lords' Journal, 19th May, 1874.

Solicitor for the Appellants: *Alexander Dobie.*
Solicitors for Respondents: *Baxters & Co.*

THE AGRA BANK, LIMITED, AND THE AGRA AND MASTERMAN'S BANK, LIMITED . . . . . } APPELLANTS;

AND

MARY TERESA BARRY, AND ROBERT HENRY HALY . . . . . } RESPONDENTS.

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June 11, 12, 15.

Mortgage, Equitable and Legal—Priority—Registration Act (Ireland)—Client affected by Solicitor's Knowledge.

The non-production, in *Ireland*, of title deeds to the solicitor instructed to prepare a mortgage upon an estate there, will not of itself be deemed a proof that the solicitor has acted fraudulently, or even negligently, so as to affect the interests of his client. The construction to be put upon his conduct does not depend on an inflexible rule of law, but upon the circumstances of the case.

Where, therefore, the owner of an estate in *Ireland* had already created an equitable mortgage upon it by depositing the title deeds with a creditor, (which equitable mortgage was not registered); and, afterwards, on being asked for them by a solicitor who was about to prepare, for another creditor, a legal mortgage of the same estate, gave an excuse for their non-production, which, under the circumstances, appeared quite satisfactory, and also supplied in his own handwriting a summary statement of their contents; and the solicitor, in total ignorance of the equitable mortgage, and of all that had been previously done, prepared the legal mortgage, which was duly registered:—

Held, that the legal mortgage had priority over the equitable mortgage, and was not assailable on the ground that the solicitor had improperly acted in preparing it without insisting on the production of the deeds:

Per LORD SELBORNE:—It is inconsistent with the policy of the Irish Registration Law to impose on a mortgagee, or purchaser, the duty of inquiry with a view to the discovery of previous unregistered interests, but quite consistent with it, if he knows of the existence of those interests, to estop him from contending that, as to him, they are void merely because they are unregistered.

The doctrine of imputing in all cases the knowledge possessed by the solicitor to the client who employs him, considered.

Wormald v. *Maitland* (1) questioned.

Observations on the form of a decree for taking the accounts in such a case.

IN the year 1847, *Mary Teresa Haly* (widow) was married to *Alexander Mackay*, who, in the year 1850, became the proprietor of a business in the jute trade at *Serajgunge*, in *Bengal*. In 1851,

(1) 35 L. J. (Ch.) 69.

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George Richard Barry was admitted as his partner in this business. Each partner was, under the articles of partnership, to be entitled to draw out of the concern for his own use a sum of Rs.400 (£40) per month. *Mackay* died at *Dacca* on the 14th of September, 1856, and by his will dated the 15th of August, 1856, he left everything to his wife and children, and made her his sole executrix. He left by her two children, *Alexander James* and *Mary Georgina*, both of whom are still minors. His property consisted of a policy on his life for Rs.25,000 (£2500), his share in the *Serajgunge* concern, and some other matters not of considerable amount. The amount of the policy was received by the executrix, and invested in Government securities. The profits of the business of *Mackay, Barry, & Co.* amounted, up to *Mackay's* death, to above Rs.206,963, equal, for the share of *Mackay*, to £10,348 3*s.* 6*d.* Mrs. *Mackay* did not draw this sum out of the concern, but permitted it to remain there for the benefit of the business, *Barry* undertaking to pay the usual Indian rate of interest, 10 per cent., for the same. In the year 1857, Mrs. *Mackay* married *George Richard Barry*, and advanced to him the Rs.25,000, the policy money, on his undertaking to give her, as executrix of *Mackay*, security for the same. This money was not all lent at once, but at intervals, and she, pressing for security on account of her children, obtained from him on the 28th of February, 1861, a bond, given to her in her character of executrix of *Alexander Mackay*, in the penal sum of Rs.50,000, to secure the payment on the 3rd of December, 1863, of Rs.25,000, with any farther advances, and 10 per cent. interest, with annual rests. As a farther security, he executed a mortgage, of even date, of his interest in certain tea estates in *Assam*. The jute concern was in 1864 sold by *Barry* to a limited company for £28,000, but no part of the purchase-money was handed over to the executrix of *Mackay's* estate. Mrs. *Barry* became in 1866 much alarmed at the state of money matters in *India* and in *England*, and pressed her husband for security for her children. He was at that moment in apparently prosperous circumstances, was a member of parliament for the county of *Cork*, and was known to be engaged in the purchase of estates in *Ireland*. He consented to give the required security, and the solicitor employed to prepare it was Mr. *William Henry Daniel*

Oehme, who had not before been employed by Mr. or Mrs. *Barry*, but who had practised in *India*, and was acquainted with Indian as well as English business. Mr. *Barry* gave him instructions to prepare the deed of mortgage, which was to be given upon *Barry's* Irish property. This property consisted of certain estates at *Gortnaclough* and *Crinallow*, and also of *Dunbollog*, the purchase of which last-named property was not, at that time, completed. Mr. *Oehme*, with a view of preparing the deed, asked *Barry* for the conveyances; he received the draft conveyance of *Dunbollog*, but, on asking for the conveyances of the *Gortnaclough* and *Crinallow* properties, he was told that they were at Mr. *Barry's* residence at *Lota*, in the county of *Cork*, but particulars of them were promised to be furnished, and those particulars were furnished in writing by *Barry* himself. Mr. *Robert Henry Haly* (Mrs. *Barry's* son by her first marriage), who had previously managed the business in *India*, consented to be the trustee under the deed, which was executed on the 5th of October, 1866. This deed conveyed the *Gortnaclough* and *Crinallow* property, and also the *Dunbollog* property (the purchase of which last-named property had been completed on the 11th of June, 1866) to *Haly* in trust for Mrs. *Barry*, or other the legal personal representative of *Alexander Mackay*, with a proviso for redemption on payment of £31,641 12*s.* 6*d.* (that sum being taken as the gross amount of *Barry's* indebtedness to *Mackay's* estate) on the 1st of January, 1872, with interest at 5 per cent. This deed was registered on the 12th of October, 1866. At that time *Barry* was, in fact, considerably indebted to the *Agra Bank* (*Limited*), especially for a loan of £25,000 advanced by the *Agra & Masterman's Bank* (now the *Agra Bank*) in June, 1860, and had written certain letters to the bankers, dated the 27th and the 29th of June, 1865 (1), and the 7th and the 13th

(1) The important part of that letter, which formed the foundation of the banker's claim, was as follows:—

"With reference to the conversation I had with you this morning on the subject of my receiving a loan from the bank of £25,000 for six months, I beg to state that, in security for same, I shall be prepared to lodge with you the joint promissory note of Mr. *W. Thompson* and myself for the above amount, with debenture bonds in my favour for £30,000, due on the 1st of January, 1867, as collateral security, or, if the bank would prefer it, would lodge the title deeds of the property in *Ireland*, which I am now purchasing, to the above value. You will oblige

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of April, 1866, which they insisted constituted an equitable mortgage of his Irish property in their favour. The deeds of the *Gortnaclough* and the *Crinallow* property had been, in fact, deposited with the bankers, instead of being at *Barry's* house at *Lota*, but no deposit of the deeds of the *Dunbollog* property had been made.

On the 1st of February, 1867, the Appellants filed a cause petition (which was afterwards amended) praying for specific performance of the agreement by way of equitable charge contained in the aforesaid letters. The original bill was drawn against *Barry* himself, but he died on the day before it was put on the file, and it was afterwards amended by making Mrs. *Barry* and Mr. *Haly* parties thereto. The amended bill filed on the 25th of May, 1868, charged that the granting of the mortgage to Mrs. *Barry* was fraudulent, that it was granted without consideration, that no inquiry was made for the title deeds of *Gortnaclough* and *Crinallow*, and that the neglect to make such inquiry was itself a legal fraud sufficient to deprive the Defendants of any priority by reason of the registration of their mortgage, and that they must be taken to have had notice—constructive notice, at least—through *Oehme*, of the previous equitable mortgage to the bank.

The Defendants, in their answer, denied all knowledge of the loan of £25,000 to *Barry*, or of any security given for it.

The cause was heard before the Master of the Rolls, who declared the deed of the 5th of October, 1866, to be fraudulent and void as against the bankers. Mrs. *Barry* appealed against that decision, contending that the cause petition ought to have been dismissed with costs, so far as it sought to obtain priority for the demand of the bank over the mortgage of the 5th of October,

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me by placing my application before your directors to-day, and, hoping that they will accede to my proposal,

"I am, &c.,

"*G. R. Barry.*"

The bank directors did agree to the proposal, advanced the money, and received the deeds relating to *Gortnaclough* and *Crinallow*. The transaction as to the *Dunbollog* estate was not then completed, and the deeds relating to that property were never deposited, though Mr. *Barry*, on the 29th of June wrote to say he would lodge them "when the purchase of the *Dunbollog* property is completed." There were thus memoranda accompanying the deposit of the title deeds. As to the propriety of registering (under a similar Act, the Irish Bankers Act), in a case where such memoranda existed, see *Copland* v. *Davis* (Law Rep. 5 H. L. 358).

1866, to the extent of any moneys thereby secured which were at the date thereof due upon the bond and mortgage of the 1st of March, 1861. The Lord Chancellor (Lord *O'Hagan*) and the Lord Justice of Appeal *Christian* expressed their opinion that the decree of the Master of the Rolls must be varied (1), for that giving priority to the first equitable mortgage, though unregistered, over the second legal mortgage, which was registered, it could not be sustained, there being no evidence whatever to shew that the grantees in the mortgage deed had been guilty of any fraud or had had notice, actual or constructive, of the equitable mortgage.

This was an appeal against that decision.

Mr. *Fry*, Q.C., and Mr. *Gerald Fitzgibbon*, Q.C. (of the Irish Bar), (Mr. *Westlake*, Q.C., was with them), for the Appellants:—

The real claim of the Respondents here rests alone on the fact of registration. But it has long since been decided that registration of a deed, with notice of a prior deed unregistered, shall not prevail against it: *Blades* v. *Blades* (2). The object of the statute was to prevent frauds: *Forbes* v. *Deniston* (3). No one can doubt that the solicitor who prepared the deed was, at the least, utterly careless to inform himself of the facts, and avoided making any inquiry which might be inconvenient to his clients. He must, therefore, be taken in Equity to have been cognisant of those facts, or at least to have the full opportunity of being cognisant of them, and, being so, his knowledge affects his clients with notice; for in all the cases a determination not to inquire, a wilfulness in evading the duty to inquire, has always been treated as equivalent to actual notice. Vice-Chancellor *Turner* so expressly declared in *Hewitt* v. *Loosemore* (4), although he did not apply the rule in that case, because he did not think that the evidence there had made out that there was any evasion of inquiry. That case was cited and considered in *Wormald* v. *Maitland* (5), and there it was held that constructive notice of a prior unregistered incumbrance affecting lands in *Middlesex* is as effective as actual notice, and an equitable mortgage of a prior date, though

(1) Ir. Rep. 6 Eq. 128.
(2) 1 Eq. Cas. Abr. 358.
(3) 4 Bro. P. C. (8vo. Ed.) 189.
(4) 9 Hare, 449; 21 L. J. (Ch.) 69.
(5) 35 L. J. (Ch.) 69.

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unregistered, was held to have priority over even a registered marriage settlement. *In re Allen's Estates* (1) is to the same effect. In *Sheldon* v. *Cox* (2) notice of an unregistered mortgage was held to affect subsequent mortgagees who had registered, and the fact that the agent of the subsequent mortgagees was himself the owner, was declared to make no difference in the matter. *Boursot* v. *Savage* (3) was to the same effect. There *A.*, being one of three trustees, executed an assignment of the trust property. *A.* was also a solicitor, and subsequently effected a sale of the same property, in which sale he acted as solicitor for the purchasers, and they were held to be, through him, affected with notice of the previous assignment. *Hine* v. *Dodd* (4) does not affect this case, nor *Jolland* v. *Stainbridge* (5), nor *Wyatt* v. *Barwell* (6), nor *Chadwick* v. *Turner* (7), for they really all depended on what amounted in each to notice, and they declared nothing more than this, that where you allege fraud you must make it out clearly by proof. Then comes the question, what is the general rule in such cases as the present, whether actual notice is required, or whether constructive notice is not enough. It is submitted that constructive notice is enough. In *Le Neve* v. *Le Neve* (8), constructive notice, that is, notice through the agent of the Defendant, was held to be notice to the Defendant himself, and that was a case which related to marriage articles, where of course the ordinary rule of presumption would be in favour of the articles. Here there is strong ground for believing that *Barry* never intended to mortgage this property to the Respondents, but did what he did solely to defraud the bankers, from whom he had just before procured a large advance of money. Their loan was a real loan, while the sums which made up the £31,000 of the mortgage deed were not shewn to be really owing. In such a case constructive notice must be sufficient.

In *Ireland*, which has long been a registry country, these matters were constantly occurring, and the rule has there been laid down plainly in a succession of cases, that the knowledge of the solicitor is the knowledge of the client, and constructive notice has

(1) Ir. Rep. 1 Eq. 455.
(2) 2 Eden, 224 ; Amb. 624.
(3) Law Rep. 2 Eq. 134.
(4) 2 Atk. 275.
(5) 3 Ves. 478.
(6) 19 Ves. 435.
(7) Law Rep. 1 Ch. Ap. 310.
(8) 3 Atk. 646; 1 Ves. 64; Amb. 436.

again and again been held to be sufficient. *Marjoribanks* v. *Hovenden* (1) was a remarkable instance. There, *A.*, a solicitor, was the owner of some property in right of his wife. He executed to *M.*, in 1805, a mortgage of this property. This mortgage was not registered. In 1806, he executed a second mortgage of the same property to *N.*, being in that instance employed by *N.* as her solicitor and agent. This mortgage of 1806 was duly registered. Yet in a contest for priority between these two mortgagees, it was held that *N.* was affected with notice of the mortgage of 1805 in consequence of her having employed *A.* as her solicitor, and so could not rely on the priority which she would otherwise have enjoyed in consequence of the registering of the mortgage executed in 1806. Lord Chancellor *Sugden* there discussed all the leading cases, and expressed a clear opinion that if a purchaser employed a solicitor who had any knowledge of an incumbrance affecting the property, such knowledge must, in law, be treated as communicated to the principal, although the latter might, in fact, be wholly unconscious of the existence of the incumbrance. In a case like this it is the duty of a party to inquire, and if he abstains from making any inquiry he must take the consequence. In *Nixon* v. *Hamilton* (2), a solicitor prepared a deed of separation between man and wife, he fraudulently prevented it from being registered. Afterwards, acting as solicitor for the husband and for *X. Y.*, who lent the husband money, he prepared another deed as security for *X. Y.'s* advances, and he inserted in this second deed the same property as that which was the subject of the separation settlement. *X. Y.'s* deed was registered, but it was nevertheless postponed to the prior unregistered settlement because of the knowledge of the solicitor being imputed to the client. *Lenehan* v. *McCabe* (3) is to the same effect. And that rule has been applied where the person has united in himself the character of owner of the property and of solicitor. In *Rorke* v. *Lloyd* (4), *A.*, who was the owner of some land and was a solicitor, made to *B.* a mortgage of the land on the 20th of March, 1856, this mortgage was not registered till April 3, 1859. *A.* made a lease of the same land to *C.* on the 7th of March, 1859, and registered

(1) 1 Dru. Rep. t. Sug. 11.
(2) 2 Dr. & Wal. 364.
(3) 2 Ir. Eq. Rep. 342.
(4) 13 Ir. Ch. Rep. (N.S.) 273.

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it at once, being paid by *C.* for his trouble as solicitor in the transaction. It was held that *A.* was *C.'s* solicitor, and that *C.* was affected, through him, with notice of the prior unregistered mortgage, and the lease was postponed to the mortgage. That judgment was taken to the Court of Appeal, and was there affirmed (1). In *Ratcliffe* v. *Barnard* (2) the same rule of affecting the mortgagee through the knowledge of the solicitor was admitted, though it was not applied in that case, the Court being of opinion that there had not been any actual negligence on the part of the mortgagee's solicitor. *Kennedy* v. *Green* (3) and *Whitbread* v. *Jordan* (4), shew that where there might have been inquiry, but none has been made, constructive notice is sufficient to affect the parties.

Here, there was nothing like an advance of money, an indefinite sum was left in the hands of the husband to carry on the trade in which he and his partner had been engaged. There was no doubt private influence used to get this deed, for which, after all, there was no proof that any valid consideration had been given.

Mr. *Isaac Butt*, Q.C., Mr. *O'Hagan*, Q.C., and Mr. *Ronayne* (all of the Irish Bar), were for the Respondents:—

The real question here is as to the construction of the Act of *Anne*. That Act (6 Anne, c. 2, *Ir.*) was passed in order to give effect to an object treated by the Legislature as most important, and stated in the preamble to be that of "securing purchasers, preventing forgeries and fraudulent gifts, and conveyances of lands." The 3rd section requires that "a memorial of all deeds shall be registered." The 4th section declares that all registered deeds shall be taken "as good and effectual in law and equity according to the priority of time of registering;" and the 5th section provides that "every deed not registered shall be deemed and adjudged as fraudulent and void," not only as against a registered deed, "but likewise against all and every creditors and creditor by judgment, recognisance, statute merchant, or of the staple, confessed, acknowledged, or entered into, as for and concerning all honours, lands," &c., "contained or expressed in such

(1) 14 Ir. Ch. Rep. (N.S.) 442.
(2) Law Rep. 6 Ch. Ap. 652.
(3) 3 My. & K. 699.
(4) 1 Y. & C. Ex. 303.

memorial registered as aforesaid." Taking these sections together it is impossible to doubt what was the intention of the Legislature, and that that intention was especially to prevent the occurrence of such a case as this. The case of *Nixon* v. *Hamilton* (1) does not affect the present, for there the questions were whether the solicitor who prepared the second deed had not a full knowledge of the first, and if so, whether his knowledge must not affect his client, the second mortgagee, and in both matters an affirmative answer was given. No such answer could be given here. *Barry* was not the solicitor of Mrs. *Barry*, his position was hostile, not fiduciary, and therefore she could not be affected through his knowledge or his acts. The solicitor who prepared this deed, Mr. *Oehme*, was wholly ignorant of the preceding transactions between *Barry* and the bankers, and the deed which he prepared in honest ignorance of them was duly registered. The alleged equitable mortgage of the bankers was not registered; the deeds of the *Gortnaclough* and *Crinallow* estates were asked for by Mr. *Oehme*, the solicitor for the Respondents, and an excuse, apparently reasonable and sufficient, was given to him. He throughout acted *bonâ fide*. All argument about not making an inquiry was therefore excluded. The demand here made by the Appellants amounted to this, that a transaction, a secret transaction, of which nobody but the parties concerned, the bankers and *Barry*, could know anything, and which was not registered, was to have priority over a regular and formal deed (founded, too, upon a long previous existing liability) which had been duly registered. To give it that priority would be entirely to defeat the Statute of *Anne*. Even if the circumstances here were not nearly so strong as they really are in favour of the Respondents, the fact of registry ought to decide the matter to their advantage. *Marjoribanks* v. *Hovenden* (2) is an authority for the Respondents. Lord Chancellor *Sugden* there said (3): "The only difficulty is that this is a conflict between a registered and an unregistered instrument, and that in cases of registry it has been held that direct notice is requisite. I am disposed to follow those decisions, and, as between a registered and an unregistered deed, not to bind the party who has the

(1) 2 Dr. & Wal. 364.
(2) Dru. Ch. Rep. t. Sug. 11.
(3) Ibid. 22.

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legal priority by any casual circumstances, which in other cases might be considered as amounting only to constructive notice." The decision in that case, therefore, did not affect the question of the validity and force of the registry, but was owing to the fact that not merely a constructive notice to the solicitor had been proved there, but that he knew really everything connected with the transaction, and so the rule of a client being bound by the knowledge of his solicitor became applicable. In *Chadwick* v. *Turner* (1) it was expressly declared that a title which has been registered can only be affected by clear and distinct notice amounting, in fact, to fraud. That was a case on the Registry Act for the *East Riding of Yorkshire* (6 Anne, c. 35), which resembled in all its material points the other Registry Acts of that reign. In *Hewitt* v. *Loosemore* (2), though it was admitted that the knowledge of the solicitor would bind the mortgagee who employed him, yet if that solicitor was himself the mortgagor, his employer would not be bound by any uncommunicated fact which it was the interest of such a mortgagor to conceal from the mortgagee. Here the mortgagor was not the solicitor, but he had a real interest in concealing from the mortgagee what he had done. And that case also decided that a legal mortgagee will not be postponed to a prior equitable one on the ground that the title deeds have not been got in, unless there had been, in that respect, fraud or wilful negligence on the part of the legal mortgagee, and that neither fraud nor wilful negligence will be imputed to a mortgagee who has *bonâ fide* made an inquiry for the title deeds, and has received a reasonable excuse for their non-delivery. That case may well be taken as decisive of the present. *Wyatt* v. *Barwell* (3) decides that notice to avoid a registered deed must be clear, distinct, and positive; and *Ratcliffe* v. *Barnard* (4) shews that mere omission by the solicitor to examine all the title deeds will not be sufficient to fix the legal mortgagee with constructive notice of a prior equitable charge.

The case of *Wormald* v. *Maitland* (5), where it was held that constructive notice of a prior unregistered incumbrance affecting

(1) Law Rep. 1 Ch. Ap. 310.
(2) 9 Hare, 449; 21 L. J. (Ch.) 69.
(3) 19 Ves. 435.
(4) Law Rep. 6 Ch. Ap. 652.
(5) 35 L. J. (Ch.) 69.

lands in *Middlesex* is as effectual as actual notice, cannot be supported. Such was the opinion of Lord Justice *Christian* in this very case, founding himself on the authority of Lord Chancellor *Sugden* in *Marjoribanks* v. *Hovenden*, and of Lord Chancellor *Brewster* in a case of *Russell* v. *Cushell*, decided in Trinity Term, 1867. The latter case was not reported, but it had appeared satisfactory to the Lord Justice, from his examination of it, as stated in Mr. *Madden's* work on Registration. In that case Lord Chancellor *Brewster* had expressly declined to follow the case of *Wormald* v. *Maitland*. *Plumb* v. *Fluitt* (1) is an early and an important case, and was referred to as such by Lord Justice *Christian*. There title deeds were deposited as a security for money; a creditor of the mortgagor fearing his immediate insolvency, not having notice of this equitable incumbrance, took a conveyance of the same premises; and this conveyance was held good. Lord Justice *Christian*, quoting that case, introduced the circumstance of the existence of a registry, and expressed his opinion that a person who takes the legal estate without the deeds, has a preferable title to him who takes the deeds without the legal estate, and without even registering the agreement which constituted him an equitable mortgagee. Of course that mode of putting the matter implies an absence of fraud, and there is not the slightest ground to impute fraud in this case. The Respondents knew nothing of the real circumstances and situation of *Barry;* he appeared to be a man of wealth; he put himself forward as such; he was believed to be purchasing estates in *Ireland;* he sat in Parliament as a member for an Irish county, and in every respect seemed to be a man who was to be trusted. Acting in natural confidence upon these circumstances the Respondents, to whom a large debt was justly due, and who, in this matter, were acting as trustees for the children of a deceased person, took the security of a legal mortgage and shewed their good faith by registering it. A merely unregistered equitable mortgage cannot be set up against a registered legal mortgage taken under such circumstances; nor can it be alleged, as in *Kennedy* v. *Green* (2) or in *Whitbread* v. *Jordan* (3), that there had been wilful negligence or wilful avoiding of inquiry when the circumstances should have induced the parties to

(1) 2 Anstr. 432.
(2) 3 My. & K. 699.
(3) 1 Y. & C. Ex. 303.

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make it. There were no such circumstances here. This case more resembles that of *Jones* v. *Smith* (1), where Vice-Chancellor *Wigram* divided cases of constructive notice into two classes, first, where there was actual knowledge of the fact that the property was incumbered in some way, and the party about to take a security on it did not inquire in what way, so that the Court bound him by constructive notice; or secondly, cases in which the Court has been satisfied that he had designedly abstained from inquiry for the very purpose of avoiding notice. Here the Respondents had not only no knowledge, but they had no suspicion, of any existing incumbrance; and they do not fall within either of those classes of cases.

Mr. *Fry* replied.

THE LORD CHANCELLOR (Lord *Cairns*):—

My Lords, although this case has occupied a considerable time at your Lordships' Bar in the very able arguments which you have heard, I do not propose to detain you at any length in expressing the opinion which I have been able to form upon the case.

My Lords, there are some facts in the case which appear to me to be proved beyond all possibility of dispute. The bankers obtained their security, an equitable security, in the year 1865. Mrs. *Barry*, the executrix, and her trustee, obtained their security and registered their security in the year 1866. It appears to me to be clear upon the evidence, after reading both the evidence in chief and the cross-examination, that, at the time the security of October, 1866, was given, there were undoubtedly claims existing on the part of Mrs. *Barry*, as executrix of her former husband's estate, against the late Mr. *Barry*, who was then her husband. It appears to me to be clear beyond all doubt that Mrs. *Barry* urged her husband to give her a security upon his property in respect of those claims, and that she repeated that demand, or that request, from time to time during the weeks or months that elapsed before the security was actually given. It farther appears to me to be clear upon the evidence of Mr. *Oehme*, the solicitor who was appointed to prepare the security which Mr. *Barry* was about to give to his wife as executrix, that so far as Mr. *Oehme* was concerned he had actually

(1) 1 Hare, 43; 11 L. J. (Ch.) (N.S.) 83.

no notice whatever of the prior equitable charge which had been given to the bank. And, my Lords, I am bound to say, looking at the evidence in this case, it appears to me to be entirely beyond the power of the Appellants to challenge in this case the general character of Mr. *Oehme*, or to impute to him here any wilful participation in a fraud.

That being the state of the case as to the facts, the ground, and the only ground, which I can find alleged on the part of the Appellants for the purpose of defeating altogether the security given to the executrix, is this, that Mr. *Oehme* did not obtain from Mr. *Barry* the title deeds of the estates over which the security was given, and that he did not investigate the titles to those estates. Now, as regards the title deeds, it is proved, and there is no statement to the contrary, that Mr. *Oehme* asked Mr. *Barry* for the title deeds. It is said that he asked for those deeds, not to hold them as part of the security, but, in order, by means of the contents of those title deeds, to prepare the security with more accuracy. That may be a just observation, but at the same time, asking for the title deeds in this way, he was told, in *England*, that the deeds were at the residence of Mr. *Barry* in *Ireland*. That was a very natural, plausible, and credible statement, and he accepted that statement; and the circumstance that he was told that they were in *Ireland* might account not merely for their not being produced to him, for the purpose of the preparation of the security, but also for the fact that they were not handed over to him upon the occasion of the execution of that security.

But what your Lordships have to consider is, the effect of the circumstances to which I have referred upon a security for land situated in a country where a system and law of registration prevail. Your Lordships have been referred to the Act of *Anne*, which established a registry of deeds in *Ireland*, and your Lordships have been referred to the authorities which have been decided with reference to the state of the law of registration since the passing of that Act. My Lords, any person reading over that Act of Parliament would perhaps in the first instance conclude, as has often been said, that it was an Act absolutely decisive of priority under all circumstances, and enacting that under every circumstance that could be supposed, the deed first registered was to take

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precedence of a deed which, although it might be executed before, was not registered till afterwards. But, by decisions which have now, as it seems to me, well established the law, and which it would not be, I think, expedient in any way now to call in question, it has been settled that, notwithstanding the apparent stringency of the words contained in this Act of Parliament, still if a person in *Ireland* registers a deed, and if at the time he registers the deed either he himself, or an agent, whose knowledge is the knowledge of his principal, has notice of an earlier deed, which, though executed, is not registered, the registration which he actually effects will not give him priority over that earlier deed. And, my Lords, I take the explanation of those decisions to be that, which was given by Lord *King* in the case of *Blades* v. *Blades* (1), upwards of 150 years ago, the case which was mentioned just now at your Lordships' Bar. I take the explanation to be this, that inasmuch as the object of the statute is to take care that, by the fact of deeds being placed upon a register, those who come to register a subsequent deed shall be informed of the earlier title, the end and object of the statute is accomplished if the person coming to register a deed has, *aliunde*, and not by means of the register, notice of a deed affecting the property executed before his own. In that case the notoriety, which it was the object of the statute to secure, is effected, effected in a different way, but effected as absolutely in respect of the person who thus comes to register as if he had found upon the register notice of the earlier deed. If that is so, your Lordships will observe that those cases depend, and depend entirely, upon the question of actual notice either to the principal, or to the agent whose knowledge is the knowledge of the principal.

But, my Lords, have authorities gone any farther than to the length which I have stated? Has it ever been decided, with regard to a Register Act such as that which prevails in *Ireland*, that negligence in not asking for the title deeds, or not taking up the title deeds, shall postpone a registered security? I am not going to say a word with regard to the effect of negligence of that kind in a country like *England*, where there is no general registration of deeds and no Act of Parliament like the Irish Act. But I am

(1) 1 Eq. C. Ab. pl. 12, p. 358.

unable to discover any principle upon which mere negligence and mere failure to take all the securities that might be taken, could, in a country subject to a law like the *Irish Register Act*, postpone a registered deed. It appears to me that the object of such a statute as the Irish statute is to give a premium to diligence in registration; and to say that if the question is merely a question of greater or less diligence, greater or less care, the advantage enures to the person who shews his diligence by first registering his own deed. Of course you may have cases in which there may be such a course of conduct as was indicated in *Kennedy* v. *Green* (1), commented on in the case of *Jones* v. *Smith* (2) by Vice-Chancellor *Wigram*—conduct so reckless, so intensely negligent, that you are absolutely unable to account for it in any other way than this, that, by reason of a suspicion entertained by the person whose conduct you are examining that there was a registered deed before his, he will abstain from inquiring into the fact, because he is so satisfied that the fact exists, that he feels persuaded that if he did inquire he must find it out. My Lords, I do not wish to express any decided opinion at this moment upon a case of that kind. If such a case should arise, I do not desire to say whether, in my opinion, such a case could or could not be deemed sufficient to get rid of the provisions of the *Irish Registry Act*. But what I do say, with great confidence, to your Lordships is, that the present case does not resemble that; there is no such negligence here as, to my mind, carries with it any appearance of fraud. The conduct of Mr. *Oehme*, the solicitor in this case, appears to me to be natural under the circumstances, and not to be tainted with anything which could have even the imputation of *mala fides* cast upon it.

Well, my Lords, are there cases which bear a contrary import to that which I have endeavoured now to express? There is a case which was before Vice-Chancellor *Stuart*, the case of *Wormald* v. *Maitland* (3); and with regard to that case I can only say, that if it is to be held as deciding, that in a register country, with such a statute as exists in *Ireland*, the mere circumstance that, on the occasion of a marriage, the abstract of title to the property settled

(1) 3 My. & K. 699.
(2) 1 Hare, 43; 11 L. J. (N.S.) Ch. 83.
(3) 35 L. J. (Ch.) 69.

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was not examined on behalf of the lady about to be married, and on behalf of the children who might be born, the mere fact that there was not this examination would postpone the registered settlement—if that is the effect of the decision, I am unable, my Lords, to say that that is a decision which commends itself to my judgment. It appears that in the case of *Allen's Estates* (1), which was decided in *Ireland*, the learned Judge in the Landed Estates Court founded his decision upon this case of *Wormald* v. *Maitland* (2); but it appears, from what was said in the present case by the Lord Justice *Christian*, that, at the time the learned Judge of the Landed Estates Court so decided, he was not aware that the then Lord Chancellor of *Ireland* (Lord Chancellor *Brewster*) had, in *Russell* v. *Cushell* (3), decided in opposition to the view expressed in *Wormald* v. *Maitland* (2). I cannot take, therefore, that case as an authority governing or affecting the present case; and that case being removed out of the way, there is absolutely no authority that I am aware of in support of the proposition of the Appellants.

That, my Lords, would dispose of the present case, but for a question which has arisen as to the form of the decree. The decree, as it stands, does not direct a general account of all advances made, out of the estate of the testator, to the late Mr. *Barry*, but it directs an account upon the footing of a particular sum expressed in the bond and mortgage deed of the year 1861, a sum of £2500, or thereabouts. It assumes that that sum is part of the larger consideration stated in the deed of 1866, and directs an account upon the footing of that sum as to how much of it remains due. My Lords, I should have thought that the more regular and more convenient course would have been to direct a general account of all advances made out of the assets to, or of all assets received by, the late Mr. *Barry*, and if the question were here for the first time, I cannot but think that your Lordships would be disposed to direct the accounts somewhat in that manner. But, my Lords, the Appellants would prefer, if there is to be an account, that it should be in the form in which it has been directed in the Court below; and the Respondents certainly have not

(1) Ir. Rep. 1 Eq. 455.
(2) 35 L. J. (Ch.) 69.
(3) Not reported, but mentioned in Madden on Registration.

shewn their anxiety to alter the form of account by presenting any cross appeal. I am not at all prepared to admit, for a moment, that it is not competent to your Lordships, on being asked to review a decree directing an account of this kind, to consider, independently of the views of the party appealing, what is the proper orm in which the account should be directed. But, at the same time, it does not appear to me that any substantial injury would be done to either party here by leaving the account in the form in which it is already directed, and which I do not think either side has strenuously urged should be altered, unless for the purpose, as the Appellants contend, of having the bill dismissed altogether. I do not, therefore, propose to advise your Lordships to make any alteration in the form of the account. I notice the point lest it should be thought to have escaped your Lordships' observation, but in accordance with what I have said, I think the justice of the case will be met by simply dismissing the present appeal, and dismissing it with costs.

LORD HATHERLEY:—

My Lords, I entirely concur in the view that has been expressed by the noble and learned Lord on the woolsack as to the course which it is incumbent upon us to pursue under the peculiar circumstances of this appeal.

I confess, my Lords, that when the case was opened, as it was with great ability by Mr. *Fry*, I did become anxious to investigate somewhat narrowly the exact position of the parties with reference to the execution of the deed of the 5th of October, 1866. Observations were made by him, which made some impression upon my mind, as to whether *mala fides* existed in the representation of the consideration for that deed. After the full discussion that the case has since received, and after all the sifting that the evidence has undergone, I am now satisfied that, at all events on the part of Mrs. *Barry*, whatever might have been Mr. *Barry's* views or objects, there was no cognisance whatever, and there is no ground whatever to suspect her cognisance, of an account having been made out which was in itself fictitious and fraudulent.

It turns out that, beyond all dispute, deeds were executed in 1861, to which the Court below has, I think most justly, attributed

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full validity. As far as regards all that was secured by the bond and the mortgage of 1861 there was not any question at all.

The question that arose was as to the additional amount comprised in the security of 1866. I say "the additional amount," because I have not any doubt whatever, for it is fully and clearly sworn to, and on cross-examination that statement has in no way been displaced, that the documents of 1861 did form a part of the consideration for the £31,000 secured by the documents of 1866. As to the remaining portion of that charge it was made out in a way much more open to observation. It is stated now that it was ascertained with regard to the jute manufactory, which had been carried on in partnership by Mr. *Mackay* and Mr. *Barry*, that no account of the partnership had been taken after Mr. *Mackay's* death—that Mr. *Barry*, who a year or two subsequently married the widow of Mr. *Mackay*, had been allowed, as surviving partner, to retain the whole of the assets—that after that time steps were taken which led to a sale of the property—and then it was, as Mrs. *Barry* represents very naturally, and in a mode which I think is entitled to all credit, that she began to have misgivings as to whether or not she had sufficient security for the debt which was due to her as executrix, and began to press her husband for some security for that debt.

I think there is quite enough to prove that you cannot impute to Mrs. *Mackay*, even if you should treat this account itself as not correctly made out, a knowledge of any fraudulent manufacture of accounts for the purpose of making out a consideration.

I think, upon this evidence, we must almost assume as a fact that the concern had been profitable, because it was sold, as everybody admits, to a company for a payment in shares, which company expected, I suppose, to receive some profits from it. We arrive, then, at the fact that Mrs. *Barry* must have been aware that her late husband had made certain profits; we also arrive at the fact that she had no knowledge of any part of her husband's share of the profits having been paid over, or accounted for in any way to her as executrix. There were, therefore, profits that ought to have come to her, profits that she had not received, and profits for which she was going to lose all security upon the sale

of the business. I think, under these circumstances, it is a great deal too much to say that she ought to have known that there was some erroneous statement as to the exact amount of those profits —that there were some deductions which ought to have been made which were not made. It is enough for me if I arrive at the conclusion that she might reasonably and *bonâ fide* believe that the sum due to her on the undisputed deed of 1861, and the sum due to her in respect of profits as to which she would be entitled to have security, would amount, or might reasonably be taken as far as she knew, to amount to such a sum as was included in the purchase deed.

It is not sufficient to say that she had not gone through the whole of this account if we, sitting here in judgment upon the whole of the case, can arrive at the conclusion that she might reasonably believe it to be a true and correct account. Upon that point I have satisfied myself.

Having satisfied myself of Mrs. *Barry's* honesty in the transaction, I then proceed to see what is the evidence that would induce your Lordships to follow decisions which would postpone the registered security of 1866 to the unregistered security granted to the Appellants in 1865, on the ground that knowledge, not actually existing in Mrs. *Barry's* mind, must be imputed to her of the security which had been effected in 1865. Now as regards the facts of that part of the case, I have not, after carefully examining the evidence, the slightest hesitation in coming to the conclusion that Mr. *Oehme* knew nothing of that matter whatever. He was told that, as to the *Gortnaclough* and *Crinallow* properties, the deeds were at *Lota*, near *Cork;* the instructions being at that moment given to him in *London* by Mr. *Barry*, who was then himself in *London*. He farther distinctly declares, upon cross-examination, that although he soon afterwards became acquainted with the liabilities and embarrassments of Mr. *Barry*, he did not then know of any such embarrassment, or of Mr. *Barry* being in difficulties, until after the execution of the deed of the 5th of October, 1866, his first intimation, I think, having been derived from the action having been brought by or on behalf of the present Appellants on the 25th of October, 1866. Why, then, should he have on his part any suspicion of any impropriety in the trans-

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action? He would know that there had existed this previous partnership in the jute concern; he would know that Mr. *Barry* had subsequently married the widow of his former partner; he would know that this gentleman was desirous of giving his security, and he would have handed to him (as a matter of fact he deposes to it in his affidavit) the deed of 1861, by which he would see that security had already been taken to a certain extent, and that what was wanted was farther security for providing, to an increased extent, for the debt.

It is said, however, that his suspicions should have been aroused when certain documents were handed to him purporting to be a description of parcels taken from the very deeds, and also when the amount of the debt for which the security was to be given and prepared by him, having been originally stated to be £16,000, was afterwards stated to be £31,000. As regards the documents being copied from the deeds, it by no means necessarily follows that he should have been brought to that conclusion, or that having been told that the deeds were at *Lota* in *Ireland*, he should have said, you might have brought me these deeds to see what they were; you have taken the description of the parcels from them, and therefore, why did you not, instead of giving me the descriptions of the parcels taken from the deeds, give me the deeds themselves? It is all very well to say that now, after it is found out that this deception has been perpetrated upon the present Appellants. But I apprehend that it would be going far beyond anything that is to be found in *Jones* v. *Smith* (1), or in *Hewitt* v. *Loosemore* (2) to say, that having once been told that the deeds were in *Ireland*, he should, after some other information was given to him, have pursued a variety of other inquiries, turning round in suspicion upon his employer and saying, you told me just now that the deeds were in *Ireland;* now you have produced another paper which you must have taken from them. To say that a suspicion of this sort must have crossed his mind, and that if he did not act upon this suspicion he is to be held guilty of a wilful determination not to have his eyes opened, would be to say what is not warranted. It would be perfectly monstrous to hold

(1) 1 Hare, 43; 11 L. J. (N.S.) Ch. 83.
(2) 9 Hare, 449; 21 L. J. (N.S.) Ch. 69.

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any doctrine of that sort. He is amply relieved from that by what had previously taken place.

My Lords, although I have carefully gone into this part of the case, I wish to guard myself by saying that it is not necessary for the decision of this case, to say anything upon the distinction with regard to the doctrine of wilful ignorance, and imputation of knowledge, for the purpose of setting aside transactions conducted in an ordinary way in a country where no register exists, as contrasted with a country where, as in *Ireland*, or with places where, as in *Middlesex* and *Yorkshire*, registers do exist. I can easily conceive that a distinction may well be held to exist between the necessary searches, the omission of which will be considered by a Court as indicating wilful negligence on the part of a person perparing a security, when he has to conduct his business in the ordinary way, between vendor and purchase, or mortgagor and mortgagee, in a country where no registration exists, and a country where a register does exist. Especially is there a distinction when he is told in the register country that everything that is not upon the register is, as against him, fraudulent and void. The purchaser registers his deed, and having placed his deed upon the register, assumes that everything he can possibly require for the purpose of his own protection is done, there not being any previous incumbrance upon the register, and he *bonâ fide* knowing of none. Then the question comes to be whether he is bound to make a strict search and inquiry, by the examination of a person coming to him to prepare a security, as to what he may know with respect to what deeds there may be outstanding, or the like. There is a very wide difference between the case of a person who has the safeguard, as he supposes, of the register for his protection, and the case of a person who has to rely only upon these ordinary means of information.

But it seems to me that it would be somewhat extraordinary to give the advantage to a person who has neglected to give the information to others which by registering he would give, and who has thereby (if this doctrine be true, that on such extremely light grounds of comparison the knowledge can be imputed to a person taking a subsequent deed), enabled his mortgagor, or vendor, to commit a fraud upon a subsequent purchaser or mortgagee. And

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it would be the more extraordinary to give him this advantage because in the transaction a solicitor has been employed, and that solicitor may, by some negligence or other, but in perfect good faith, have omitted to make due inquiry. I say it would be an extraordinary thing to allow the person, who in the first instance has been guilty of gross negligence in not registering the deed, (contrary to the words of the Act of Parliament,) to obtain the advantage of priority over the person taking the subsequent instrument, although that person had neither himself, or through his solicitor, the slightest actual knowledge of the previous transaction, which can only be brought home to him by the doctrine of imputed or constructive notice. I must say, when the time comes for considering that question, I should like to consider it a little more fully before holding that it can give such a right as is here asserted. However, my Lords, in this case, as I have said before, I do not think any such right can be asserted as against Mr. *Oehme*.

Then there remains only a single question, namely, as to whether Mr. *Barry* is to be taken to be the agent of Mrs. *Barry* in this transaction, so as to fix a knowledge of the fraud upon Mrs. *Barry*. My Lords, it appears to me that that is directly contrary to, instead of following, the case of *Le Neve* v. *Le Neve* (1). In that case Mr. *Le Neve*, the husband, knew everything: he employed the solicitor as Mr. *Barry* employed his solicitor here. Lord *Hardwicke* did not stop to inquire about the position of the husband; that was a known, an acknowledged; it was an admitted fact in the case. What he said was: The husband has employed this solicitor, and I must inquire whether this solicitor knew anything of the transaction; and, finding that he did, finding that he had been consulted about, and had even assisted the husband in perpetrating the fraud, Lord *Hardwicke* came to the conclusion (whether that conclusion has been repudiated by different Judges since or not) that under those circumstances, through the guilty knowledge of the solicitor, although he was innocently employed as far as regarded the lady herself, she, the lady, must be implicated, and must suffer the loss. How can that compare for one moment with the position of the husband himself in the case? Really, if

(1) 3 Atk. 646; Amb. 436; 1 Ves. 64.

the doctrine is to be carried so high as that, where is it to stop? If a person asks a friend to recommend a solicitor, who afterwards happens unfortunately to be mixed up with a fraud, under the circumstances of the case you could not deal with him as an intermediate agent, and as having that knowledge which would have served to postpone the incumbrancer.

I think, my Lords, happily, in this case we have none of those questions presented to us. It is quite sufficient for me to say that I do not think that *Oehme's* position has been brought within *Hewitt* v. *Loosemore*, or any of those other cases; and therefore I think that, upon every ground, Mrs. *Barry* is entitled to retain her security, and that this appeal should be dismissed with costs.

LORD SELBORNE:—

My Lords, I entirely agree with the opinions which your Lordships have expressed. It has been said in argument that investigation of title and inquiry after deeds is "the duty" of a purchaser or a mortgagee; and, no doubt, there are authorities (not involving any question of registry) which do use that language. But this, if it can properly be called a duty, is not a duty owing to the possible holder of a latent title or security. It is merely the course which a man dealing *bonâ fide* in the proper and usual manner for his own interest, ought, by himself or his solicitor, to follow, with a view to his own title and his own security. If he does not follow that course, the omission of it may be a thing requiring to be accounted for or explained. It may be evidence, if it is not explained, of a design inconsistent with *bonâ fide* dealing, to avoid knowledge of the true state of the title. What is a sufficient explanation, must always be a question to be decided with reference to the nature and circumstances of each particular case; and among these the existence of a public registry, in a country in which a registry is established by statute, must necessarily be very material. It would, I think, my Lords, be quite inconsistent with the policy of the *Register Act*, which tells a purchaser or mortgagee that a prior unregistered deed is fraudulent and void as against a later registered deed—I say it would be altogether inconsistent with that policy to hold that a purchaser or mortgagee is under an obligation to make any inquiries with a view to the discovery of

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unregistered interests. But it is quite consistent with that, that if he or his agent actually knows of the existence of such unregistered instruments when he takes his own deed, he may be estopped in equity from saying that, as to him, they are fraudulent.

With regard to the account, the Appellants, failing altogether to overturn the Respondents' security, cannot be heard to ask that the form of the account shall be altered in their favour without letting in all such alterations as will be proper to make it, in all respects, right, to whatever party these alterations may prove most beneficial. Rather, however, than do that, they elect that their appeal shall be dismissed with costs, and I think, under all the circumstances, it is proper that it should be so dismissed.

Order appealed from affirmed; and appeal dismissed, with costs.

Lords' Journals, 15th June, 1874.

Solicitors for the Appellants: *Ashurst, Morris, & Co.*
Solicitors for the Respondents: *Holmes, Anton, Greig, & White.*

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June 30.
1874
May 15; *June* 22.

JOHN BAIN AND JOHN PATERSON . . . } PLAINTIFFS IN ERROR;

AND

RICHARD FOTHERGILL AND T. ALERS HANKEY . . . . . } DEFENDANTS IN ERROR.

Contract for Sale of Real Estate—Breach of—Damages for.

Upon a contract for the sale and purchase of a real estate, if the vendor, without fraud, is incapable of making a good title, the proposing purchaser is not entitled to recover compensation in damages for the loss of his bargain.

F. was in possession of a mining royalty under a written agreement for a lease, of which he had taken an assignment. One of the stipulations of the agreement was that *H.* (the person with whom the agreement was originally made) should not assign without the licence of the lessors. They were ready to consent to the assignment to *F.* provided he would execute a duplicate of the agreement containing this stipulation. Though repeatedly communicated

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with on the subject he delayed doing so. He entered into a contract with *B.* to sell his interest in the royalty, it was afterwards found that the lessors absolutely refused their assent to the transfer, and *F.* was unable to perform his contract with *B.* In an action by *B.* against *F.* for its non-performance:

Held, that *B.* could only recover the expenses he had incurred, but not damages beyond them.

Flureau v. *Thornhill* (1) adopted and affirmed.

Hopkins v. *Grazebrook* (2) overruled.

Per LORD CHELMSFORD:—The rule laid down in *Flureau* v. *Thornhill* (1) as to the limits within which damages may be recovered upon the breach of a contract for the sale of real estate, must be taken to be without exception. If a person enters into a contract for the sale of real estate, knowing that he has no title to it, nor any means of acquiring it, the purchaser cannot, in an action for breach of the contract, recover damages beyond the expenses he has incurred. Any other damages must be the subject of an action for deceit.

Per LORD HATHERLEY:—A contract for the sale of real estate is very different from a contract for the sale of a chattel. In the former the purchaser knows that there must, with all the complications of our law, be an uncertainty as to making out a good title; in the latter the vendor must know what his right to the chattel is.

THIS was a writ of error on a judgment of the Exchequer Chamber, which had affirmed a previous judgment of the Court of Exchequer (3) in an action brought by *Bain & Paterson* to recover damages for the breach of an agreement, dated the 17th of October, 1867, by which *Fothergill & Hankey* undertook to sell, and transfer, to *Bain & Paterson* their interest in a certain mining royalty in the county of *Cumberland*, known as "*Miss Walter's Royalty.*"

Anthony Hill, the former owner of the *Plymouth Ironworks* at *Merthyr Tydvyl*, held under an agreement for a lease, dated the 19th of October, 1861, the royalty in question. The lease was to be a lease for twenty-one years, as from the 20th of March, 1860, at a rent of £100 a-year and a royalty rent of 2*s.* 2*d.* per ton of ore raised. Mr. *Hill* died in August, 1862, and in August, 1863, his executors contracted with *Fothergill & Hankey* to sell them his interest in this agreement. It was one of the conditions of *Hill's* agreement that he should not assign or sublet without the assent of the lessors. When *Hill's* executors made this contract

(1) 2 W. Bl. 1078. (2) 6 B. & C. 31.
(3) Law Rep. 6 Ex. 59.

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with *Fothergill & Hankey*, who appeared to have succeeded him at the *Plymouth Ironworks*, they applied to the lessors for a consent. The lessors were willing to give it, provided that *Fothergill & Hankey* would themselves execute a duplicate of the assignment, in which was repeated the proviso that they were not to underlease or assign without the consent of the lessors. A consent in writing was accordingly prepared in duplicate, and on the 16th of June, 1865, one part was executed by the lessors, and their solicitors, retaining that part, sent the other part to the solicitors of *Fothergill & Hankey* to obtain the execution of it by their clients. It was not executed by them, although there were numerous communications on the subject, and had not been executed by them at the time when they entered into the contract with *Bain & Paterson*, of *Harrington*, in the county of *Cumberland*, for the sale of their interest in the royalty. The contract for that sale consisted of an offer and acceptance. The important parts of it were these, "We offer to sell you our interest in the '*Miss Walter's Royalty*,' in *Cumberland*, on the following terms: £2500 to be paid us in cash on our handing you a transfer of the said royalty," a rent of £300 a-year during the remainder of the term, and a royalty of 1*s.* a ton beyond the royalty payable under the original agreement, such additional royalty to merge in the additional rent of £300 a year, and a deposit of £250 was to be paid forthwith; to which was added this clause, "The usual covenants for our protection as standing between our lessors and you to be made by you."

This offer was signed by *Fothergill* for himself and his company, and underneath were written these words, "We accept of offer on terms stated. *Bain & Paterson.*" The deposit was forthwith paid. *Fothergill* wrote and signed at the foot of the agreement these words, "I confirm this (*sic*) within and acknowledge the receipt of your cheque for £250." *Bowerbank*, the agent for *Miss Walter's Royalty* refused any consent till the required duplicates should have been signed. *Fothergill* by letter informed him that the interest in the royalty had been disposed of to *Bain & Paterson*, and requested him to facilitate the needful transfer. In a letter of the 4th of November, 1867, addressed to *Fothergill*, *Bowerbank* said: "Yours of the 2nd to hand, and in reply beg to

say I cannot understand how you could dispose of the royalty without my consent. A document was sent on the 16th of June, 1865, to your solicitors in *London*, for your signature, which has not yet been returned. As soon as that document is returned you will then know in what position you are as to disposing of the royalty without our consent."

Several letters passed between the parties, and on the 13th of November, 1867, *Fothergill* wrote to *Bain & Paterson* a letter in which he said, "To-day for the first time I have seen the consent to the assignment of the agreement between *Joseph Walters* and others with the late Mr. *Anthony Hill* to the *Plymouth Iron Company*, by which I learn, for the first time, that a similar consent is necessary between the *Plymouth Iron Company* and yourselves. It is a sad pity that we should have both been ignorant of the condition, for it appears to me that unless the consent can be obtained by you, our arrangement of the 17th of October must fall through, for I have evidently made no impression upon Mr. *Bowerbank*. Please, therefore, to try what you can do and let me know, as, if unsuccessful, we must return you the deposit money. I send you copy of consent to the assignment referred to, and, if you can suggest any way of overcoming the difficulty, we will do all in our power to assist." *Bain & Paterson* answered on the 14th of November, 1867, "We do not feel disposed to give up the contract, and it appears to us that the onus of obtaining licence from lessors lies with you," but they promised "to do all in our power to mediate with Mr. *Bowerbank*." On the 16th of November, *Fothergill* wrote again, "I regret much to hear of your non-success with Mr. *Bowerbank*. That this difficulty should have turned up is most vexatious to us, but your Mr. *Paterson* will remember that when he commenced the negotiation with me I distinctly and repeatedly told him that I was not informed upon the conditions under which we held it. I cannot therefore see how the onus lies with me. As you put it, a condition exists of which I certainly knew nothing, exacting a consent which I have no means of obtaining, and which I am advised is absolutely essential to action, and which consent both you and I have tried in vain to obtain. Is it not, therefore, better to abandon an arrangement which we cannot carry through."

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The royalty was in September, 1868, sold by *Fothergill & Hankey*, through the intervention of Mr. *Bowerbank*, and at his desire, to a Mr. *Stirling*, and *Fothergill* offered to return to *Bain & Paterson* the deposit of £250, which offer was not accepted.

Bain & Paterson then commenced this action, in which they sought to recover the deposit, interest, and expenses, and in addition, damages for the loss of their bargain. The Defendants paid into Court a sum sufficient to cover the deposit, interest, and expenses. The facts were turned into a special case and argued before the Court of Exchequer, and on the 15th of November, 1870, that Court pronounced judgment, declaring that the claim for damages was not sustainable. This judgment was affirmed in the Exchequer Chamber, no arguments being heard, as it was the intention of the parties to bring up the case to this House.

The Judges were summoned, and Mr. Baron *Martin*, Mr. Justice *Keating*, Mr. Baron *Pigott*, Mr. Justice *Brett*, Mr. Justice *Denman*, and Mr. Baron *Pollock* attended (1).

The *Solicitor-General* (Sir *G. Jessel*), and Mr. *Herschell*, Q.C., for the Plaintiffs in Error:—

The real question here is, whether the decision in *Flureau* v. *Thornhill* (2) is to be supported, and to what extent it is to be applied? In that case, it was held that a contractor for the purchase of a real estate to which the title proves (without collusion) defective, is entitled to no satisfaction for the loss of his bargain. That doctrine was there laid down for the first time, and there is no justification for it in the enactments of any statute, or in the principles of the Common Law. Its age, therefore, now about 100 years, will not alone support it as a valid decision. There ought to be a line of cases recognising and adopting it, in order to make it a valid and binding authority now. There is nothing of the kind. It will be seen that when it came to be applied in a direct manner, it was not adopted; it was distinguished. Its principle is known not to apply to a sale of chattels,

(1) The case was heard before Lord *Chelmsford*, Lord *Colonsay*, and Lord *Hatherley*. Lord *Colonsay* died before judgment was delivered.

(2) 2 W. Bl. 1078.

why should it be made to apply to a sale of land? The supposed rule does not exist in any other country—certainly not in *Scotland*, where civil law principles are followed—nor even in the *United States*, where the prevailing law is founded upon our own Common Law. That is the first point in the case.

The second point is, that even if *Flureau* v. *Thornhill* (1) was good law, it does not apply to a case like the present. It applies only to a case where the vendor is in possession, has a title, and has never had reason to believe that his title was defective. Here that was not the case. And this farther limitation may be added, that the defectiveness of the vendors' title ought not to arise in any way from his own default. Here it did directly so arise, for *Fothergill* knew that he had in fact no title to the property, and that the lessors would not confer one till he signed the duplicate which had been left at his solicitors, but which he had always neglected to execute.

In *Flureau* v. *Thornhill* (1) Lord Chief Justice *De Grey* says: "If the title proves bad, and the vendor is (without fraud) incapable of making a good one, I do not think that the purchaser can be entitled to any damages for the fancied goodness of the bargain which he supposes he has lost." And Mr. Justice *Blackstone* remarks, that, "These contracts are merely upon condition, frequently expressed, but always implied, that the vendor has a good title. If he has not, the return of the deposit with interest and costs is all that can be expected." There is no authority of any kind referred to as justifying these propositions. The Judge at the trial had thought that no damages could be given; but the jury had given damages contrary to that opinion. The motion was for a new trial on that account, and the majority of the Court granted it, but Mr. Justice *Nares* hesitated about granting the rule; and Mr. Justice *Blackstone* sought to prove that no injustice could be done in the case, for that on a sale and re-sale of stock the loss which the verdict was intended to compensate could not have occurred. It is clear that that case has little weight as an authority.

Then came the case of *Hopkins* v. *Grazebrook* (2). There a person who had contracted for the purchase of an estate, but had

(1) 2 W. Bl. 1078; see 1 Esp. 368. (2) 6 B. & C. 31.

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not obtained a conveyance of it, put it up for sale, engaging to make a good title by a certain day, which he could not do, as he did not get his conveyance. The purchaser from him was held entitled to recover not only expenses, but also damages for the loss sustained by not having the contract carried into effect. In that case, Lord Chief Justice *Abbott* said: "If it is advanced as a general proposition that where a vendor cannot make a good title the purchaser shall recover nothing more than nominal damages, I am by no means prepared to assent to it." And then, taking the particular facts of that case, he held the vendor to be liable in damages for a breach of contract. The supposed general principle of non-liability to damages was therefore deliberately discountenanced, and the fact that the vendor had by his own fault occasioned the breach of contract, was held sufficient to fix him with liability. That case completely establishes the right of the Plaintiffs here. There is no principle of law adverse to their title to ask for damages, and the conduct of the Defendants has been such as to make them responsible. In *Walker* v. *Moore* (1), where the Plaintiff sought to sustain a claim of this sort, he had seen the abstract of title, but never referrred to the deeds mentioned in it. On the abstract the title appeared good; when the deeds were examined it appeared defective, and he was held not entitled to recover damages for the loss of his bargain. But that was because he had had full opportunity of knowing everything, and had chosen to act without making himself acquainted with the facts presented to him. That case, therefore, was not in opposition to *Hopkins* v. *Grazebrook* (2), and Mr. Justice *Bayley* founded his decision on the circumstance that they were "very different" from each other. Nor does the case of *Sikes* v. *Wild* (3) affect the present, for there, though the general remarks of Chief Justice *Erle* appear to sustain the doctrine in *Flureau* v. *Thornhill* (4), his decision really went on the ground of *bona fides* on the part of the vendor who had, when he sold the land, full reason to believe that he could make a good title, who had not concealed anything, and had been guilty of no default of his own. But even in that case, when it was originally decided in the Court of Queen's

(1) 10 B. & C. 416
(2) 6 B. & C. 31.
(3) 1 B. & S. 587; 4 B. & S. 421.
(4) 2 W. Bl. 1078.

Bench, Lord Chief Justice *Cockburn* expressed it clearly as his opinion that the Defendants were liable, observing (1): "I can see no reason, in the absence of authority, for extending the immunity to parties who, knowing that they have not any estate to convey, take upon themselves to sell, in the speculative belief that they will be able to procure the interest and title before they are called upon to execute the conveyance." The principle thus expressed had been acted on in *Robinson* v. *Harman* (2), where a man who had only a life interest in certain rent contracted to grant a lease of the land itself. In that case Baron *Parke* declared the rule of the Common Law to be, "that where a party sustains a loss by means of a breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed." And both Baron *Parke* and Baron *Alderson* treat *Flureau* v. *Thornhill* (3) not as having laid down a rule of law, but as having engrafted an exception on the rule of the Common Law. In principle the decision in *Flureau* v. *Thornhill* (3) cannot be supported, though in *Sikes* v. *Wild*, Lord Chief Justice *Erle* endeavours to support it by the observation (4) that, "the damages in the case of land may vary indefinitely. A small fragment of land may be almost invaluable with reference to the comfort of the purchaser, but the value of chattels may be replaced by delivery of their market price," a remark which entirely disregards the *pretium amoris*, which is as applicable to certain chattels as it can be to certain land.

In *Engel* v. *Fitch* (5), mortgagees sold the lease of a house and undertook to give possession on the completion of the purchase. The title was good, but when the time arrived, the mortgagor, who was in actual possession, refused to quit. The purchaser was held entitled to recover damages as well as expenses. That case was carried to the Exchequer Chamber (6), and the judgment was affirmed. All these cases shew that when the fault of the non-completion of the contract can properly be imputed to the party himself, and is the result of his own acts, or, as in this last

(1) 1 B. & S. 596.
(2) 1 Ex. 850.
(3) 2 W. Bl. 1078.
(4) 4 B. & S. 423.
(5) Law Rep. 3 Q. B. 314.
(6) Law Rep. 4 Q. B. 659.

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case, could be set right by his acts, the disappointed purchaser has a right to recover damages as well as expenses. In this respect the judgments of Lord Chief Justice *Cockburn* and Lord Chief Baron *Kelly* may be taken as in opposition to that of Lord Chief Justice *Erle*, and the principle seems to be in favour of the former. If the impossibility to perform the contract arises from some unanticipated difficulty of a legal sort in the perfecting of the title, it may well be that the innocent vendor may be excused from the payment of damages, for, as Mr. Justice *Blackburn* said in *Lock* v. *Furze* (1), "from the complicated nature of our law of real property, no man can be certain that he has a perfect title to his estate." But when it is the consequence of his own negligence, or still worse, of his refusal to do what is necessary to be done in order to perform the contract, the vendee is entitled to damages. It is the vendor's own wrong, and he ought to compensate the vendee whom he has made to suffer from it. These principles have, in themselves, been recognised by Lord *St. Leonards* in his Vendors and Purchasers (2), though he thinks *Flureau* v. *Thornhill* (3) to have been rightly decided. His opinion must have depended on the circumstances of the case, and it may be considered as agreed in the profession that *Flureau* v. *Thornhill* (3) extended only to cases of mere defectiveness of title, and had no reference whatever to cases in which personal conduct was in the least degree concerned.

Recent cases have proceeded on this distinction. *Lock* v. *Furze* (4) expressly decides that *Flureau* v. *Thornhill* (3) did not apply to a case where a lease was pretended to be granted by a person who had in reality no title to grant it. And in *Godwin* v. *Francis* (5), where a man pretended to sell without getting the consent of his co-owners to the sale, the Court held that the action was maintainable, and that the proper measure of damages to which the purchaser was entitled for the breach of contract was the cost of investigating the title, the costs he had been put to in unsuccessfully endeavouring to enforce his purchase, and the difference between the contract price and the market price of the

(1) Law Rep. 1 C. P. 453.
(2) 13th Ed. pp. 300-302, citing *Bratt* v. *Ellis* and *Jones* v. *Dyke* (MSS.)
(3) 2 W. Bl. 1078.
(4) Law Rep. 1 C. P. 441.
(5) Law Rep. 5 C. P. 295.

estate; and the price for which the estate was afterwards sold was treated as *primâ facie* evidence of the market price. In that case *Flureau* v. *Thornhill* (1), *Hopkins* v. *Grazebrook* (2), and *Engel* v. *Fitch* (3), were all cited and commented on, and the case must therefore be considered as the latest exposition of judicial authority on the subject. It is a very strong case in favour of the Plaintiffs here, for in that case there was no actual personal misconduct of the Defendant which could be alleged as the cause for the non-performance of the contract, and which he could at once have remedied. He had merely mistaken his own authority to act for his co-owners of the property. Here it is contended that the Defendant's inability to perform the contract arose from the continued negligence of *Fothergill* to do what the lessors had a right to require.

Mr. *Manisty*, Q.C., and Mr. *Holker*, Q.C. (Mr. *J. R. Mellor* was with them), for the Defendants in Error:—

The attempt here is to overrule a case which was decided nearly a hundred years ago, and has been acted upon ever since. For in no instance has that case been really impugned, but it has only been said that the particular circumstances of other cases rendered it inapplicable to them. And not one judge nor even one text writer has denied it to be good law. On the contrary, Lord *St. Leonards* is clearly in its favour: Vendors and Purchasers (4). The question has always been whether the particular case before the Court fell within the rule or was an exception to it. The decisions in the cases already quoted do not affect the rule laid down in *Flureau* v. *Thornhill* (1). Even *Hopkins* v. *Grazebrook* (2) did not. That case merely shewed that where there was personal fault attributable to the vendor he might thereby make himself liable to damages. That was shewn, too, most clearly in the observations of Lord Chief Justice *Jervis* and of Mr. Justice *Vaughan Williams* in *Pounsett* v. *Fuller* (5), where all the cases were fully examined, and it was held that the purchaser of a real estate was not entitled to compensation for the loss of his bargain where the vendor,

(1) 2 W. Bl. 1078.
(2) 6 B. & C. 31.
(3) Law Rep. 3 Q. B. 314.
(4) 13th Ed. c. 9, s. 3, p. 301.
(5) 17 C. B. 660; 25 L. J. (C.P.) 145.

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though he could not make a title, had, when he contracted to sell, reasonable grounds for supposing that he could do so. There the vendor knew that by a written agreement he possessed the right of shooting over a particular estate, and believing that agreement to be a complete title to the right, he sold the right to another person. His title was defective because there had been no grant of this right under seal, and he was sued for damages, but was held not to be liable to pay them. That case was the counterpart of the present. Here the vendor was really in possession, and, as he believed, under a complete title; he entered into a contract for the sale of his right, but his title was defective for a reason similar to that which existed in *Pounsett* v. *Fuller* (1); there was a necessity for somebody else to make his good equitable title a complete legal title. It was not his fault that this was refused, and he was not liable to damages for the refusal.

There can be no doubt that *Hopkins* v. *Grazebrook* (2) did introduce one very strong restriction on the case of *Flureau* v. *Thornhill* (3), and has always been so considered in the profession, and for that reason it has not been approved. In Vendors and Purchasers (4) the cases are commented on, and Lord *St. Leonards* says: "But *Hopkins* v. *Grazebrook* (2) has not been followed. It would be difficult to support it, for the seller, in the view of Equity, had an equitable title, and such sales are clearly valid in Equity; although if a man were a mere land jobber, and bought an estate, and before a conveyance, and without having paid for it, carried it at once into the market with a view to profit, that might be considered a case of fraud, and an attempt to sell, at an improved price, the original seller's estate, and thereby involve him and the sub-purchaser in litigation. Short of circumstances amounting to fraud, the case seems to fall within the general rule. In the later cases of *Walker* v. *Moore* (5), and *Pounsett* v. *Fuller* (1), the Courts followed *Flureau* v. *Thornhill* (3), without expressly overruling *Hopkins* v. *Grazebrook* (2), but the decisions in those cases do, in effect, overrule the decision in that case. It has always appeared to the writer that the distinction taken in the latter case

(1) 17 C. B. 660; 25 L. J. (C.P.) 145.
(2) 6 B. & C. 31.
(3) 2 W. Bl. 1078.
(4) 13th Ed. c. 9, s. 3, p. 301.
(5) 10 B. & C. 416.

[*Hopkins* v. *Grazebrook*] could not be supported without overruling *Flureau* v. *Thornhill* (1), and it is much too late to impeach the authority of that case, which, moreover, was properly decided." This opinion was first published by Lord *St. Leonards* in 1857, and has since been repeated by him in the later editions of his work.

This distinction as to cases where there is personal blame attributed to the vendor and cases where there is none, has been adopted in *America*. In *Sedgwick* on Damages (2) it is said: "Where the vendor has no title whatever, and holds himself out as the proprietor where he is not," the vendee is entitled to damages; and this opinion is, in different terms, repeated in other places (3).

In *Engell* v. *Fitch* (4) Lord Chief Baron *Kelly* says: "We are far from wishing to throw any doubt on *Flureau* v. *Thornhill*" (1); and afterwards, upon fully stating what was the decision in that case, he says: "We are far from dissenting from that proposition in the most extensive terms it can be laid down." That case having been so long recognised, the great principle of law that the rules of law should be certain, and that it is most mischievous to render them uncertain, applies, and the decision in *Flureau* v. *Thornhill* (1) ought not to be disturbed.

But take *Hopkins* v. *Grazebrook* (5) as a case which is to be followed, then it is clear that the circumstances on which that case was decided do not exist here. The vendors here were in possession; they believed, and were justified in believing, that the property was theirs; they knew of nothing to impeach their title, and they contracted to sell what they knew that they actually

(1) 2 W. Bl. 1078.

(2) 4th Ed. p. 202.

(3) Id. 227–229. In p. 234 Mr. *Sedgwick* says: "An important exception has been introduced from the civil law in regard to damages recoverable against a vendor of real estate who fails to perform and convey the title. In these cases the line has been repeatedly drawn between parties acting in good faith, and failing to perform because they could not make a title, and parties whose conduct is tainted with fraud or bad faith. In the former case the Plaintiff can only recover whatever money has been paid by him with interest and expenses (*Flureau* v. *Thornhill*, 2 W. Bl. 1078; *Hopkins* v. *Grazebrook*, 6 B. & C. 31; *Robinson* v. *Harman*, 1 Exch. 850; *Bitner* v. *Brough*, 11 Penn. R. 127). In the latter he is entitled to damages resulting from the loss of his bargain (*Pounsett* v. *Fuller*, 17 C. B. 660). This exception cannot, I think, be justified or explained on principle, but it is well settled in practice (see *Sweem* v. *Steele*, 5 Iowa 352, cited *ante*, 186)."

(4) Law Rep. 4 Q. B. 659–667.

(5) 6 B. & C. 31.

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possessed. There was no fraud here; there was no misconduct, and there was nothing to take them out of the rule in *Flureau* v. *Thornhill* (1) and to bring them within the exception which has been supposed to be engrafted on that rule. There was a distinction between the sale of land and the sale of chattels; and even as to the latter, the rule laid down in *Hadley* v. *Baxendale* (2) ought to be followed. Now here it was impossible to suppose that the damages claimed by the Plaintiffs could reasonably have been in the contemplation of both the parties when the contract was made, as the probable result of the breach of it, and if so they could not be made the subject of recovery after it was broken.

Mr. *Herschell* replied.

LORD CHELMSFORD proposed the following questions for the consideration of the Judges:—

1. Whether, upon a contract for the sale of real estate, where the vendor, without his default, is unable to make a good title, the purchaser is by law entitled to recover damages for the loss of his bargain?

2. Whether the actual possession of the property, the subject of the contract, is essential to bring the case within the rule laid down in *Flureau* v. *Thornhill* (1)?

3. Whether, if the rule of law is correctly laid down in *Flureau* v. *Thornhill* (1), the circumstances of the present case distinguish it and take it out of that rule?

MR. BARON MARTIN (3) requested time to consider these questions.

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MR. BARON POLLOCK:—

In answer to the first question submitted by your Lordships to the Judges, I am of opinion that upon a contract for the sale of real estate where the vendor, without his default, is unable to make a good title, the purchaser is not by law entitled to recover damages for the loss of his bargain.

(1) 2 W. Bl. 1078.
(2) 9 Ex. 341.
(3) His Lordship, though present at the hearing of the case, retired from the Bench before the opinions were delivered.

This was so decided as far back as the year 1775, in the case of *Flureau* v. *Thornhill* (1), and has been acted upon and almost universally acquiesced in ever since, and the rule is in my judgment consistent with good sense, and with what may be supposed to be the intention of the contracting parties; nor does it contravene any principle of law which has been established with reference to the amount of damages that may be recovered on breach of contract.

The report of the case of *Flureau* v. *Thornhill* (1) is somewhat meagre. The ground of decision, as stated by Chief Justice *De Grey*, is that, upon the contract for a purchase, if the title proves bad, and the vendor is (without fraud) incapable of making a good one, the purchaser is not entitled to any damages for the fancied goodness of the bargain. Mr. Justice *Blackstone* adds that these contracts are merely upon condition, frequently expressed, but always implied, that the vendor has a good title.

The proposition asserted by Chief Justice *De Grey*, as reported, might, no doubt, be stated in more accurate language, but its meaning is sufficiently clear, and the decision has been followed in all subsequent cases in which the facts have been substantially the same. Many of these, including *Walker* v. *Moore* (2), and *Sikes* v. *Wild* (3), were cited in argument at your Lordships' bar, and the law is, by Lord *St. Leonards* in his last edition of Vendors and Purchasers (4), considered as settled. Other cases were referred to in which a different measure of damage was acted upon, but in these the circumstances also were different. In *Hopkins* v. *Grazebrook* (5) the vendor, when he contracted to sell, had substantially no estate, and the conditions of sale contained a distinct undertaking to make a good title. Lord Chief Justice *Abbott*, no doubt, said, in giving judgment, that he should desire time to consider before he assented to the general proposition that, where a vendor cannot make a good title, the purchaser shall recover no more than nominal damages, and *Bayley*, J., appears to ground his decision upon the fact that the vendor held out the estate as his own, when, in fact, he had only an equitable title; but I can find

(1) 2 W. Bl. 1078.
(2) 10 B. & C. 416.
(3) 4 B. & S. 421.
(4) Chap. viii. s. 3.
(5) 6 B. & C. 31.

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nothing said by either of these very learned Judges which ought to lead me to doubt the correctness of the view taken in *Flureau* v. *Thornhill* (1), or to disturb a rule which for nearly a hundred years has been acted upon in a matter of constant occurrence.

In *Robinson* v. *Harman* (2) the Defendant agreed to grant a valid lease when he well knew that he had no power to do so. In *Engel* v. *Fitch* (3), in which there was given an elaborate and exhaustive judgment of the Court of Queen's Bench, confirmed by the Exchequer Chamber, the Defendants, who were mortgagees of a lease, but not in possession, sold it to the Plaintiff, undertaking by the particulars of sale that possession should be given on completion of the purchase, and on the faith of this the Plaintiff resold at a profit. The title was good, but on the Plaintiff requiring possession it was found that the mortgagor was in possession and refused to give it up, and farther, that the Defendants could have ousted him by ejectment, but refused to incur the necessary expenses. Under these circumstances, the Judges in the Queen's Bench held that the Plaintiff was entitled to recover, not merely the deposit and expense of investigating the title, but also damages for the loss of his bargain, and in giving the grounds for their judgment on the particular case, said that "the rule in *Flureau* v. *Thornhill* (1) can have no application where the failure, either to make out a title or to give possession, arises not from the inability of the vendor, but from his unwillingness either to remedy a defect in the title, or to obtain possession on the score of expense."

It was urged by the learned counsel for the Plaintiffs in Error, that the rule laid down in *Flureau* v. *Thornhill* (1) was anomalous, and differed from that which is usually applied to the assessment of damages where there has been a breach of a contract for the delivery of goods, and therefore that it ought not to be upheld. It is scarcely correct to say the rule is anomalous; that it differs from that applicable to a contract for the sale of goods is true, but the subject matter to which it is applied differs also.

It is observable in following the history of the rule in question that when it was first laid down in *Flureau* v. *Thornhill* (1) the

(1) 2 W. Bl. 1078. (2) 1 Ex. 850.
(3) Law Rep. 3 Q. B. 314; Ibid. 4 Q. B. 659.

whole question of the proper measure of damages had not received from our Courts the attention which it has done in later years. Moreover, at that time, although it had never been expressly so decided, it was commonly supposed that upon the sale of a chattel, in the absence of any warranty of title, the rule of *caveat emptor*, as laid down in Co. Litt. (1), and by *Noy* in his Maxims (2), applied, and, therefore, the suggested anomaly probably was not present to the minds of the Judges who decided *Flureau* v. *Thornhill* (3); but assuming that the difference exists, as it now undoubtedly does, there are two marked distinctions affecting the present question between a contract for the sale of personal and of real property.

In the first place, a man who sells goods must be taken to know whether they are his or not. Secondly, he must be aware that in the majority of cases the goods he is selling are intended for re-sale, or to be used by the buyer for the purpose of construction or manufacture, so that both the title of the vendor and the probable result of its deficiency may fairly be presumed to be in the minds of the contracting parties.

With real property the case differs in both these respects. First, no layman can be supposed to know what is the exact nature of his title to real property, or whether it be good against all the world or not; hence, as was said by the Court in *Engel* v. *Fitch* (4), the undoubted owner of an estate often finds, unexpectedly, a difficulty in making out a title which he cannot overcome. Assuming that the vendor acts *bonâ fide* the difficulty must be equally known to the vendee as to the vendor.

Secondly, to enter into a contract for the purchase of land in order immediately to resell it before the title is examined, is unusual and exceptional.

It seems, therefore, more reasonable to treat the mere contract for the conveyance of land not as based upon an implied warranty, that the vendor has power to convey, but as involving the condition that the vendor has good title, and that if, on examination of the abstract this turns out not to be so, the vendee cannot ask to be put in as good a position as if a conveyance with the usual

(1) Page 102 a.
(2) C. 42.
(3) 2 W. Bl. 1078.
(4) Law Rep. 3 Q. B. 314; Ibid. 4 Q. B. 659.

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covenants had been executed, but can only recover the expenses to which he has been put. All that has been hitherto said leads to the conclusion that the case of *Flureau* v. *Thornhill* (1) was rightly decided, at the time it was decided, on sufficient legal principles, but if it was a decision to which at the time I could not have acceded, I should, nevertheless, think that a contract of purchase and sale of real property made at this day must be construed to be made on the footing of that decision being correct. All persons who prepare such contracts know of that decision, and that it has been acquiesced in and acted on for a hundred years. The contracts which such persons prepare are, therefore, made with the understanding that, upon failure to make out a satisfactory title, the rule as to damages enunciated in that case will be applied. Then such rule is by intention and understanding of the parties a part of the contract.

Your Lordships' second question is: "Whether the actual possession of the property, the subject of the contract, is essential to bring the case within the rule laid down in *Flureau* v. *Thornhill?*" (1)

Such actual possession is not, I think, necessary. If I am right in what I have already stated as to what are the true grounds upon which that rule is founded, this seems to follow. In seeking to arrive at a conclusion whether the statements of a vendor as to his title are *bonâ fide* or otherwise, so as to take the case out of the rule in *Flureau* v. *Thornhill* (1), it may be material to inquire, among other facts, whether the vendor was in actual possession or not, but, assuming his *bona fides*, the fact ought not, in my opinion, to affect the question. A man who has never been in actual possession may often have better grounds for believing, and therefore may be better entitled to act upon the belief, that his title is good, than another who has been in possession for some time. Thus *A.* may have bought *Blackacre;* the abstract of title may have been investigated, and the conveyance executed without possession being taken, whilst *B.* may have been for months in possession of a family estate, his title to which may not only be doubtful, but may actually be at the very time in litigation.

In either of these cases, on a sale by *A.* or *B.* of the whole or a

(1) 2 W. Bl. 1078.

portion of the property, it may turn out, either from a more thorough investigation, or from the decision of a Court, that *A.* or *B.* had not good title to what he had sold, but in both these cases the facts might be such as ought to protect the vendor, if he had been guilty of no *mala fides,* from a liability to pay, as damages, any loss sustained by the vendor arising from his failing to reap the profits of a good bargain.

Lastly, in answer to your Lordships' third question, the circumstances of the present case do not distinguish it or take it out of the rule laid down in *Flureau* v. *Thornhill* (1).

The property in question, which the Defendants had agreed to sell to the Plaintiffs, consisted of iron ore mines, called *Miss Walter's Royalty,* and formed a small portion of a large mining estate which the Defendants had purchased in 1863 from the executors of one *Hill.* The Defendants entered into possession of the whole estate, but the purchase had not been completed upon the 17th of October, 1867.

On that day the Defendants agreed to sell to the Plaintiffs the Defendants' interest in *Miss Walter's Royalty.* Upon inquiry it it appeared that *Miss Walter's Royalty* was held by *Hill* under an agreement for a lease for twenty-one years from March, 1860, and that agreement contained a clause providing against the assignment or subletting of the premises without the consent of the lessors in writing.

Before the 17th of October one of the Defendants who negotiated the sale had been informed that it would be necessary to obtain the consent of the lessors for an assignment to third parties of the Defendants' interest, but it is found as a fact that at the meeting on the 17th of October, 1867, between one of the Plaintiffs and one of the Defendants, when the sale was negotiated, this necessity did not cross the mind of the latter, or if it did occur to him he forebore to mention it, feeling sure that no difficulty would arise in respect to such consent, and that it was therefore a matter of no importance. After this the Defendants did all that was in their power to obtain the lessors' consent to assign, but failed to do so.

The Defendants therefore acted with perfect *bona fides,* and the

(1) 2 W. Bl. 1078.

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contract failed, not because the Defendants did not do what they could have done to make a good title, but because the Defendant who personally negotiated the contract overlooked a fact which might, and in the event did, prevent them from making a good title to the Plaintiffs.

Under these circumstances it seems to me that there existed in this case all the material facts which bring it within the decision in *Flureau* v. *Thornhill* (1), and none of those which had been held to create an exception to that rule.

My learned Brothers the Lord Chief Baron, Mr. Justice *Keating*, and Mr. Justice *Brett*, concur in the opinion which I have had the honour to express to your Lordships.

MR. JUSTICE DENMAN.

MR. JUSTICE DENMAN:—

In answer to the first question put by your Lordships, I am of opinion that upon a contract for the sale of real estate when the vendor, without his default, is unable to make a good title, the purchaser is not by law entitled to recover damages for the loss of his bargain. I answer your Lordships' question, in its terms, upon the assumption that I am thereby in substance only stating that, in my opinion, the doctrine laid down in the case of *Flureau* v. *Thornhill* (1) is a part of the law of the land, binding upon all Courts of justice, and only to be altered, if at all, by the Legislature. I must, however, at once add that the rule down in *Flureau* v. *Thornhill* (1) is, in my opinion, more limited in its operation than might be contended for upon several possible constructions of the words "without his default unable to make a good title," as I shall endeavour to explain hereafter.

In the argument for the Plaintiffs in Error it was powerfully contended that *Flureau* v. *Thornhill* (1) could not be law because it was not founded on any principle; because it was at variance with the ordinary rules of law applicable to the question of the damages recoverable upon a breach of contract, and because it was merely Judge-made law, the origin of which was apparent in the case itself.

It may be admitted that the case of *Flureau* v. *Thornhill* (1) is not a wholly satisfactory case. The report is meagre, and the

(1) 2 W. Bl. 1078.

judgments unargumentative; but the case cannot truly be said to be founded on no principle. It has been frequently explained upon a principle which cannot be called unreasonable, and even in cases in which nice distinctions prevailed and prevented its operation from being held applicable, some of the most learned Judges, while declining to act upon it, have recognised it as binding, and explained the principle on which it rests. For example, in *Robinson* v. *Harman* (1), *Parke*, B., in speaking of *Flureau* v. *Thornhill* (2), says, "It was there held that contracts for the sale of real estate are merely on condition that the vendor has a good title" (adopting the judgment of *Blackstone*, J.), and then adds, "so that when a person contracts to sell real property there is an implied understanding that if he fail to make a good title the only damages recoverable are the expenses which the vendor may be put to in investigating the title." The same principle is shortly expressed by *Blackburn*, J., in the case of *Sikes* v. *Wild* (3), in the words, "It is implied from the usage of this particular business."

Nor do I think that *Flureau* v. *Thornhill* (2) is bad law because it is at variance with the ordinary rules applicable to damages on breach of contract. It has from time to time, as fresh cases have arisen, been found necessary to lay down rules for the guidance of juries in the assessment of damages. *Hadley* v. *Baxendale* (4) is a notable instance of such a rule laid down a few years ago, and now recognised as a part of the Common Law. The very fact that the rule laid down in *Flureau* v. *Thornhill* (2) has been for nearly a century recognised and acted upon as a known limitation in respect of the damages upon breach of a contract for the sale of real estate, seems almost sufficient to answer the argument founded upon the anomalous character of the rule.

Still less do I think that the argument against the rule in question, that it is "Judge-made law," ought to prevail. Difficult as it is to lay down any precise rule or definition as to the extent of acquiescence which will amount to conclusive evidence that the law as laid down in any judicial decision is a part of the Common Law of *England*, and granting that no rule ought to be laid down

(1) 1 Ex. 855.
(2) 2 W. Bl. 1078.
(3) 1 B. & S. 591.
(4) 9 Ex. 341.

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which should prevent your Lordships from overruling any decision clearly contrary to good sense, however ancient it might be, I am of opinion that the case of *Flureau* v. *Thornhill* (1), as understood in subsequent cases, and as limited by your Lordships' question, is neither absurd nor unreasonable; and that it has received an amount of subsequent judicial recognition sufficient to stamp it as part of the undoubted Common Law, to be noticed by all Courts, and not to be overruled except by the Legislature. The exact extent of the rule, and the limits of its operation, I propose to consider in my answer to the second and third questions proposed by your Lordships.

In answer to the second question put by your Lordships, I am of opinion that the actual possession of the property, the subject of the contract, is not essential to bring the case within the rule laid down in *Flureau* v. *Thornhill* (1). In order to consider this question, it appears to me to be necessary to explain my view of the exact effect and extent of the ruling in *Flureau* v. *Thornhill* (1), which, in my opinion, has sometimes been supposed to go farther than the words, or the reasons of the judgments, as reported, really go. The report, after stating the purchase by the Plaintiff at an auction of a rent issuing out of a leasehold house for £270, and payment of a deposit of £20, states that "*on looking into the title the Defendant could not make it out.*" From this I conclude that it was an ordinary case of a person in possession of property, with a holding title, and without any knowledge of any defect in his selling title, discovering for the first time, on investigation of the matter, that he has not such a title as a purchaser could be compelled to take. In such a case, and in such a case only, as it appears to me, does *Flureau* v. *Thornhill* (1) decide that the ordinary rule relating to damages for breaches of contract does not apply to sales of real estate. The language of *De Grey*, C.J., and *Blackstone*, J., seems to me quite applicable to such a case, and not strictly applicable to any other. The former says, "Upon a contract for a purchase, if the title proves bad, and the vendor is (without fraud) incapable of making a 'good one';" by which I understood him to refer to a discovery made subsequently to the making of the contract. Mr. Justice *Blackstone* says, "These

(1) 2 W. Bl. 1078.

contracts are merely upon condition, frequently expressed, but always implied, that the vendor has a good title. If he has not, the return of the deposit, with interest and costs, is all that can be expected." These words do not very correctly express that which they have been always understood to mean, viz., that the contract is one made upon the terms that if the title is not good the damages shall be limited as described; but there is no difficulty in understanding what Mr. Justice *Blackstone* meant, and I apprehend it is clear that when he speaks of an "implied *condition* that the vendor has a good title," he cannot have intended to include the case of an intending vendor *knowing* that he has not a good title, and neglecting to disclose the fact to the intended purchaser before the contract is made.

Before dismissing the case of *Flureau* v. *Thornhill* (1) it may be desirable to refer to two cases to be found in notes in the Appendix to *Sugden's* Vendors and Purchasers, which have been sometimes cited as proving that the case of *Flureau* v. *Thornhill* (1) had a wider operation than that above explained. The first of these is *Bratt* v. *Ellis* (2). That case, however, can scarcely be cited as an authority for any particular proposition, inasmuch as the decision is only to the effect that the Defendant should be let in to plead after a verdict against him on a writ of inquiry, including £250 for loss of bargain, upon payment into Court of the deposit money and interest, and on payment to the Plaintiff of costs. What became of the action does not appear.

The other case, *Jones* v. *Dyke* (3), was an action against a firm of auctioneers who professed to be authorized to sell certain estates in *Wales*, tried before *Macdonald*, C.B., at the *Hereford* assizes. The only part of the report affecting the present question is the following passage: "It appearing that the Defendants had no authority to sell, the Plaintiff had a verdict *by consent* for £261; the Judge thinking the items of which that sum was composed reasonable, but the Plaintiff did not obtain any damages for the loss of his bargain," from which it would appear that at most this was only a ruling at nisi prius; and in all probability one given

(1) 2 W. Bl. 1078.

(2) Sug. V. & P. 11th Ed. Ap. No. 4. See p. 656 in the 13th Ed., where these two cases are only referred to, but not set forth.

(3) Ibid. No. 5.

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under such circumstances as would have precluded either party from afterwards objecting to it.

Both these cases appear to have been decided between 1804 and 1808, from the dates which appear in the notes, and I can find no case throwing any light upon the subject down to the case of *Hopkins* v. *Grazebrook* (1), decided in the year 1826, which I will now consider. In that case the declaration stated that the Defendant caused the premises to be put up to sale by auction, subject to conditions that the purchaser should immediately pay a deposit, and should pay the residue of the purchase-money on the subsequent 25th of March, *and on payment to be let into possession*, and a proper conveyance should be executed by the vendor, *who undertook to make a good title* (which he did not do, nor did he execute a proper conveyance), whereby Plaintiff was deprived of all benefit to be derived from the purchase, and put to great expense. The Defendant pleaded the general issue, and paid into Court the amount of the expenses which the Plaintiff had been put to, and a small sum for nominal damages for the breach of contract. The facts proved at the trial were extremely similar to those found in the case now before your Lordships. The premises in question were part of a property belonging to *Hill & Co.*, they had contracted to sell to one *Harwood*, and the Defendant had agreed to purchase from *Harwood*. Owing to some misunderstanding which arose between *Hill & Co.* and *Harwood*, the conveyance to *Harwood* was never executed. The report goes on to state that the Defendant *expecting that the matter would be arranged*, and that the contract between *Harwood* and himself would be carried into effect, put up the premises to auction, *as stated in the declaration*, but that, in consequence of the disputes between *Hill & Co.* and *Harwood*, he was unable to complete his contract. It was admitted that he had acted *bonâ fide*. The learned Judge, *Garrow*, B., told the jurors that they were not bound to confine their verdict to nominal damages, and they having found a verdict for £70 beyond the sum paid into Court, the full Court, consisting of *Abbott*, C.J., *Bayley*, *Holroyd*, and *Littledale*, JJ., refused a rule, moved pursuant to leave reserved, to enter a nonsuit. Before considering the judgments in that case, it may be observed that there existed the following

(1) 6 B. & C. 31.

facts, which were wholly wanting in *Flureau* v. *Thornhill* (1): First, there was an express undertaking to let into possession on payment of the purchase-money on a day certain; secondly, the Defendant expressly undertook to make a good title; and thirdly, the Defendant evidently knew that he was contracting to sell a property upon an expectation only (though a *bonâ fide* one) that the contract between *Harwood* and himself would be carried into effect, a matter over which he must have known that he had no control. The contract, therefore, was not broken, as in *Flureau* v. *Thornhill* (1), by reason of a discovery that the Defendant's title was defective, but by a failure to do the very thing he had contracted to do by a certain day. Nor was it possible in that case to imply a condition "from the usage of that particular business," such as that implied in *Flureau* v. *Thornhill* (1), inasmuch as the parties had expressly agreed, absolutely and not conditionally, that a good title should be made. When carefully examined, I think that all the observations of the learned Judges in that case, read with reference to the facts of the case, amount to no more than a decision that mere inability to make a good title does not, of itself, bring a vendor within the rule laid down in *Flureau* v. *Thornhill* (1) as to damages; but that it depends upon the nature of the contract, and also upon the reasons for the inability, whether he can avail himself of that rule: and that in such a case as that of *Hopkins* v. *Grazebrook* (2) a vendor was not within the rule. It is true that several expressions of *Abbott*, C.J., and *Bayley*, J., in that case have been thought to lay down more precise rules than would be the case according to the above view of it, but in my opinion the judgments are to be read as only containing some of the reasons for holding that whether *Flureau* v. *Thornhill* (1) was correctly decided or not, it certainly was no authority for the proposition that under all circumstances, and whatever the cause of the default, a vendor unable to make a good title should have a right to break his contract, subject to a certain limited amount of damages; but on the contrary, that, notwithstanding *Flureau* v. *Thornhill* (1), a vendor who puts up an estate to auction, contracting to make a good title and knowing he has no title, is responsible for his breach of contract in the same way and to the same extent of damages as

(1) 2 W. Bl. 1078. (2) 6 B. & C. 31.

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other persons breaking their contracts. It is true there are expressions in the judgments in *Hopkins* v. *Grazebrook* (1) which, read by themselves, would seem to imply that *Flureau* v. *Thornhill* (2) could never apply where the vendor was not in possession of that which he had contracted to sell. *Abbott*, C.J., says: "The Defendant had unfortunately put the estate up to auction before he got a conveyance. He should not have taken such a step without ascertaining that he would be in a situation to offer some title." And *Bayley*, J., says, "for here the vendor had nothing but an equitable title," as though that were the test; but I think that both these expressions must be read in connection with the fact that the Defendant knew he was offering a property the title to which was defective, and his ability to sell it a matter beyond his own control. Cases may easily be conceived in which a person without actual possession, but *bonâ fide* believing that he had a present right to convey, might be properly held entitled to the benefit of the rule in *Flureau* v. *Thornhill* (2) without in any way overruling the decision in *Hopkins* v. *Grazebrook* (1), if I am right in my interpretation of its meaning and effect. *Pounsett* v. *Fuller* (3) was, in fact, such a case. There the Defendant having a mere agreement from the owner of a manor for a right of shooting, but *bonâ fide* believing that he had a selling title, contracted to sell his right of shooting to the Plaintiff. It turned out on the investigation of the title that he had no legal title. Under these circumstances it was held by the Court of Common Pleas that the rule in *Flureau* v. *Thornhill* (2) applied. After an elaborate argument, in which all the cases which had then been decided were discussed, *Jervis*, C.J., and other Judges delivered a judgment in favour of the Defendant, which seems to me quite satisfactorily to dispose of this question. *Jervis*, C.J., (4) thus shortly states the ground of the decision: "Though he had not a right to sell that which he professed to sell, inasmuch as it was an incorporeal hereditament, which could only be granted under seal, yet, as a layman, he had a fair right to believe he had the power to sell which he professed to have, and, therefore, this case comes within the qualification of the rule as expressed in *Hopkins* v.

(1) 6 B. & C. 31.
(2) 2 W. Bl. 1078.
(3) 17 C. B. 660.
(4) 17 C. B. 678.

Grazebrook (1) and *Walker* v. *Moore*" (2). He had previously stated the effect of *Walker* v. *Moore* (2) as expressly determining "that where the party is not to blame, but professes to sell that which he *bonâ fide* believes he can sell, though in fact he may have no title, he is liable only for the expenses of investigating the title;"—and the case of *Hopkins* v. *Grazebrook* (1) as deciding that where the party enters into a contract, knowing that he cannot make a title, he is remitted to his "general liability," by which is of course meant liability to damages as in an ordinary case of breach of contract. *Cresswell*, J., says, "The Defendant having a grant, though not a legal one, of the shooting, both parties acted under a *bonâ fide* impression that he had that to sell which he professed to sell; I cannot, therefore, see how the case can be brought within the exception in *Hopkins* v. *Grazebrook*" (1). *Williams*, J., uses an expression in his judgment which appears to me clearly to shew that he does not take the judgment of *Bayley*, J., in *Hopkins* v. *Grazebrook* (1), to be intended to lay down a general rule that wherever the vendor has nothing but an equitable title the rule in *Flureau* v. *Thornhill* (3) cannot apply. He says (4) "It is true that here the Defendant had a mere equitable title; but the facts shew that he did not know when he entered into the contract that he had not a perfectly good legal title. Ignorance of law is not that kind of misconduct which brings the case within the rule in *Hopkins* v. *Grazebrook*" (1).

I have come to the conclusion upon the above consideration of the cases, especially that of *Pounsett* v. *Fuller* (5), which I think was satisfactorily decided, that the application of the rule laid down in *Flureau* v. *Thornhill* (3) does not depend upon the actual possession of the property by the vendor. I think, for instance, that it would apply in the case of a sale of property, where upon investigation of the title it should be discovered that, owing to some deed of partition, the effect of which had been misunderstood, the vendor was dealing with property A. when he had only a right to sell property B., and in many other cases which may be supposed where the contract goes off, owing to a discovery subse-

(1) 6 B. & C. 31.
(2) 10 B. & C. 416.
(3) 2 W. Bl. 1078.
(4) 17 C. B. 682.
(5) 17 C. B. 660.

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quent to the contract that the vendor has not a title to sell what at the time of the contract he *bonâ fide* supposed himself to possess.

I am, however, of opinion, in answer to the third question proposed by your Lordships, that the circumstances of the present case do distinguish it and take it out of the rule laid down in *Flureau* v. *Thornhill* (1).

I need not here repeat the observations already made as to what I conceive to be the actual limits of the rule laid down in that case, or the extent of the qualification of its apparent generality established by subsequent cases; but I will at once proceed to state what I conceive to be the material facts stated in the present case.

It appears from the case that one *Hill* was possessed of certain iron ore mines, amongst others of one called *Miss Walter's Royalty*, by virtue of an agreement in 1861, for a lease for twenty-one years. This agreement contained a clause providing against assignment without the consent of the lessors in writing first thereto obtained. *Hill* having died, his executors, about August, 1863, contract to sell all the mines of *Hill* deceased, including his interest in *Walter's Royalty*, for £250,000. This purchase had not been completed when the contract, the subject of this action, was made on the 17th of October, 1867. The case then states an application by *Hill's* executors to *Hill's* lessors for their consent to the assignment to the Defendants, which the lessors were willing to give if the Defendants would execute a duplicate. A duplicate consent was prepared, and in June, 1865, one part was executed by the lessors and retained by them. The other part was sent to the solicitors for the executors to obtain the Defendants' signature, and in the same month the solicitors for the executors sent the duplicate consent to the Defendants' solicitors for their execution. The lessors' solicitors having more than once requested the solicitors for the executors to obtain the execution by the Defendants of the duplicate consent, the solicitors for the executors wrote to the Defendants' solicitors on the 11th of October, 1865, stating, as the fact was, that they had learnt from the lessors' solicitors that, unless the duplicate was sent back signed in a few days, the assent of the lessors would be withdrawn. The duplicate

(1) 2 W. Bl. 1078.

consent remained unexecuted in the hands of the Defendants' solicitors at the time when the agreement, the subject of the action, was entered into on the 17th of October, 1867. In the meantime questions arose upon several abstracts of title relating to various parts of the property included in the agreement of August, 1863, between the Defendants' solicitors and the executors' solicitors, which were not settled until October, 1868, when the purchase of all the property included in the agreement of August, 1863, was completed. Before the agreement of October, 1867, was signed the Defendant *Fothergill*, who afterwards made that agreement, had been informed that it would be necessary to obtain the consent of the lessors for the assignment to third parties of the Defendant's interest in *Walter's Royalty;* but at the meeting at which the contract sued upon was discussed and afterwards signed he made no mention of the necessity for such consent, as the case finds, either because it did not occur to him, or if it did, because he felt sure that no difficulty would arise in respect to such consent, and, therefore, that it was a matter of no importance. On the 17th of October, 1867, the agreement sued upon was signed, the material part of which is in the words: "We offer to sell you our interest in *Miss Walter's Royalty*, £2500 to be paid us in cash on our handing you a transfer of the said royalty. A deposit of £250 to be made us forthwith, and the whole arrangement to be carried out and accomplished as soon as may be. Signed *Richard Fothergill*, for &c. and self. We accept of offer in terms stated, *Bain & Co.*, per *John Paterson*." Before acceding to the proposed terms Mr. *Paterson* asked for time to consult his partners, which was declined. The bargain was thereupon concluded, and the deposit of £250 paid. Mr. *Paterson* did not learn till the 22nd or 23rd of October that the consent of the lessor was necessary. He then wrote to Mr. *Fothergill*, requesting him to sign the consent, which the Defendants had still to sign (alluding to the duplicate consent which remained unsigned in the Defendants' possession), but though the Defendants did their best to obtain the consent of the lessors, they failed to obtain such consent, in consequence of which, after attempts to make a fresh arrangement and to obtain the consent of the Plaintiffs to cancel the agreement, the Defendants, being unable to obtain the consent of the

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lessors to an assignment except to one *Stirling*, sold to *Stirling*, and the present action was commenced.

From the above statement it appears that when the contract of the 17th of October, 1867, was signed, the Defendant *Fothergill* knew that the consent of *Hill's* lessors was required before *Hill's* executors could assign their interest to the Defendants, and also that the like consent was necessary before the Defendants could effectually assign their interest to the Plaintiffs. The Plaintiffs were not informed either of the necessity or of the non-existence of such consent. It farther appears that before the contract was signed, the Defendants had had notice through their solicitor that the consent of the lessors of *Hill* to the assignment of his agreement with them was dependent upon the Defendants doing an act which they were being pressed to do as far back as October, 1865, and which had not yet been done, and that such notice was not communicated to the Plaintiffs, nor the difficulty which might obviously arise in consequence pointed out. It appears to me that under the circumstances it was so clearly the duty of Mr. *Fothergill* to have put the Plaintiffs in possession of these facts before he allowed them to sign a contract for the purchase of the royalty, that it is impossible for the Defendants to rely upon the rule in *Flureau* v. *Thornhill* (1). I think that the contract did not in this case go off through the *discovery* by the Defendants that they could not make a good title, but by reason of the over sanguine expectation on the part of Mr. *Fothergill* that an obstacle, which he *knew* to exist, and over which he had no control, would somehow or other cease to exist before the completion of the purchase. In such a case I am of opinion that the case of *Flureau* v. *Thornhill* (1) does not apply.

Finding myself, unfortunately, compelled to differ from the rest of my learned brethren in the answer I give to the third question asked by your Lordships' House, it is necessary for me to notice certain other decisions *in pari materiâ* with those already commented upon, and to consider how far they bear upon the present case, and how far they can be supported upon principle, so as to be properly regarded as binding upon your Lordships, as part of the law upon the subject.

(1) 2 W. Bl. 1078.

The first of these is *Walker* v. *Moore* (1), already referred to, decided in the year 1829, only three years after *Hopkins* v. *Grazebrook* (2). In that case the agreement for purchase was in July, 1827. The abstract of title was delivered in August, 1827, and returned in September with observations and a request for an appointment to examine documents. In November, before the appointment was made, notice was given by the purchaser of a proposed resale by him of a part of the property, and a part was resold. On the 6th of February the original documents were examined and the defect in the Defendants' title was then discovered. In that case it was held, in perfect conformity with *Flureau* v. *Thornhill* (3), and not inconsistently with *Hopkins* v. *Grazebrook* (2), that no damages for loss of bargain could be recovered. No doubt the main ground of the decision in that case, so far at least as the judgment of Mr. Justice *Bayley* is concerned, appears to have been that the Plaintiff was premature in selling before he had obtained an actual conveyance of the estate, but that ground itself, looking at the facts of the particular case, depended upon the doctrine laid down in *Flureau* v. *Thornhill* (3). *Littledale*, J., so treats the matter, and says (4): "When a contract for the purchase of lands is made *each party* cannot but know that the title *may prove* defective and must be supposed to proceed upon that knowledge." And Mr. Justice *Parke*, in his judgment, speaks of "a *defect being found* in the title;" and states the rule in *Flureau* v. *Thornhill* (3) thus: "In the absence of any express stipulation about it, the parties must be considered as content that the damages, *in the event of the title proving* defective, shall be measured in the ordinary way, and that excludes the claim of damages on account of the supposed goodness of the bargain." Both these passages are wholly inapplicable to the case of one party *knowing* that a consent to his selling the property is essential and wanting, the other party being wholly in ignorance of those facts. I am, therefore, of opinion that *Walker* v. *Moore* (1) is no authority for the Defendants' contention in the present case.

The case of *Robinson* v. *Harman* (5), appears to me to be a

(1) 10 B. & C. 416.
(2) 6 B. & C. 31.
(3) 2 W. Bl. 1078.
(4) 10 B. & C. 422.
(5) 1 Ex. 850.

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very strong authority for the Plaintiffs. That case in effect decided that where a vendor *knows* he has no title and chooses to contract for the sale of the property, he is not within the rule as to limitation of damages laid down in *Flureau* v. *Thornhill* (1). There may be some doubt whether that case is wholly reconcilable with the case of *Sikes* v. *Wild* (2), to be noticed afterwards, as to what constitutes sufficient *knowledge* on the part of a vendor to deprive him of the benefit of the rule; but in any case I am of opinion that the case of *Robinson* v. *Harman* (3) was rightly decided, because the vendor in that case, in answer to express inquiries as to his power to lease, and as to the legal estate being vested in trustees, took upon himself positively to assert that the property was his out and out, and that he alone had the power of leasing. The contract being made after such a statement, I think it was rightly held as against the vendor, that he could not set up a rule applicable only to the case where both parties are in ignorance as to whether the title will prove defective or not. He either knew in a legal sense that it was defective, or having taken upon himself to assert its perfection in a matter upon which inquiry had been expressly made, he could not set up a rule which implies ignorance of the defect in both contracting parties. I think, therefore, that his liability was properly held to be that of any person who breaks his contract, and not limited as in *Flureau* v. *Thornhill* (1).

In *Worthington* v. *Warrington* (4), decided in 1849, the doctrine in *Flureau* v. *Thornhill* (1) was again discussed and applied, but without in any way questioning the authority of *Hopkins* v. *Grazebrook* (5), or of *Robinson* v. *Harman* (3), then recently decided by the Court of Exchequer, and cited upon the argument. Mr. Justice *Coltman*, who delivered a judgment in which the rest of the Court concurred, placed his decision on grounds entirely in conformity with the view I have submitted of the true extent and application of the rule. He says "every one who purchases land knows that a difficulty *may* exist as to the making a title *which was not anticipated* at the time of entering into the contract."

(1) 2 W. Bl. 1078.
(2) 1 B. & S. 587; 4 Ibid. 421.
(3) 1 Ex. 850.
(4) 8 C. B. 134; 18 L. J. (C.P.) 350.
(5) 6 B. & C. 31.

The case of *Pounsett* v. *Fuller* (1), decided in 1856, has already been referred to. I only notice it again for the purpose of adding that I think it fully bears out the observations I have made as to the effect of the previous decisions. The only qualification of, or addition to, the law laid down in those decisions which I find in the case of *Pounsett* v. *Fuller* (1) is that which is embodied in a sentence of Mr. Justice *Williams'* judgment (2) already cited. "Ignorance of law is not that sort of misconduct which brings the case within the rule in *Hopkins* v. *Grazebrook*" (3). In the present case I do not think that Mr. *Fothergill's* neglect to mention either the necessity, or the absence, of the required consents was in the nature of an ignorance of law, but a neglect to mention an obstacle within his own knowledge and beyond his own control, and which he *knew* to be fatal as long as it existed to his title to sell; and that the mere circumstance that he either thought nothing about it, or that he expected that the obstacle would be removed, did not entitle him to the benefit of the rule in *Flureau* v. *Thornhill* (4); but on the contrary is conclusive to shew that the case is within the principle of *Hopkins* v. *Grazebrook* (3), and *Robinson* v. *Harman* (5).

I come now to the case of *Sikes* v. *Wild* (6). That was a case very peculiar in its circumstances, and led to a difference of opinion in the Court of Queen's Bench. The property in question was incumbered with an annuity, and the vendor knew that no title free of incumbrance could be made, unless the annuitant and her trustee would discharge the part sold from the trust to secure the annuity. *The annuitant had verbally agreed to transfer her security to another property*, but after the Plaintiff had agreed to buy the property, the annuitant refused her consent to the transfer, and so the bargain went off. The jury found first that the Defendants *bonâ fide* believed that they would be able to make the purchaser a good title free from incumbrance, and secondly that they had reasonable grounds for so believing. After a full discussion of the cases previously decided, Mr. Justice *Blackburn* delivered judgment for himself and Mr. Justice *Wightman* in

(1) 17 C. B. 660.
(2) Ibid. 682.
(3) 6 B. & C. 31.
(4) 2 W. Bl. 1078.
(5) 1 Ex. 850.
(6) 1 B. & S. 587; 4 Ibid. 421.

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favour of the Defendants, holding that the rule in *Flureau* v. *Thornhill* (1) applied. Lord Chief Justice *Cockburn* differed, and held that the case fell within the rule in *Hopkins* v. *Grazebrook* (2), and *Robinson* v. *Harman* (3). The judgment of the two learned Judges who held for the Defendants, though it expresses great doubt as to the soundness of the decision in *Hopkins* v. *Grazebrook* (2), and also as to the ground of that decision, ultimately proceeds upon the narrow ground that "it is impossible to say as a matter of law that there is misconduct in putting property up to sale without disclosing every material fact, and that the only ground for imputing misconduct was putting up the property for sale, though they knew that their power of making a title free from incumbrance was precarious, which the jury" (under the circumstances of the unretracted promise at the time of the contract) "had found to have been done *bonâ fide*, and not unreasonably." The judgment of the Court of Exchequer Chamber, delivered by Lord Chief Justice *Erle* (4), after stating the rule in *Flureau* v. *Thornhill* (1), goes on to say, "The damages here therefore must be assessed according to the rule in *Flureau* v. *Thornhill* (1), unless the case comes within the exception in *Hopkins* v. *Grazebrook* (2); namely, that if the intended vendor *knowingly* withholds from the intended vendee that he has not a title, he is guilty of culpable want of truth, and is bound to make the latter compensation for the loss of his bargain, and ought not to have the protection of the doctrine established by *Flureau* v. *Thornhill*" (1). It may be observed that this is certainly a somewhat free translation of the decision in *Hopkins* v. *Grazebrook* (2). The learned Chief Justice then states the proposal made to the annuitant as to a change of the property upon which her annuity was to be charged, and goes on, "She assented, and it might reasonably have been supposed that she would continue in that mind to the last. Under these circumstances the failure to make a title does not bring the case within *Hopkins* v. *Grazebrook*" (2). Upon the full consideration of these judgments, it appears to me that they do not govern the present case. The existence of a parol promise to consent to the transfer of the incumbrance, was there

(1) 2 W. Bl. 1078.
(2) 6 B. & C. 31.
(3) 1 Ex. 850.
(4) 4 B. & S. 423.

the circumstance relied upon to save the application of the rule in *Flureau* v. *Thornhill* (1), whereas in the present case, so far from the existence at the time of the contract in 1867 of any promise on the part of the lessors to consent to a sale by the Defendants to the Plaintiffs, all the facts stated in the case, especially the notice in October 1865, seem to me to shew that there was no reason for assuming such consent. Moreover it is impossible to deny that the authority of *Sikes* v. *Wild* (2), as applicable to any other case not identical in its facts, is much weakened by the forcible judgment of the Lord Chief Justice in the Court below, in favour of the Plaintiff. After commenting on the rule in *Flureau* v. *Thornhill* (1), and the reasons upon which it is founded, he adds, "But I can see no reason, in the absence of authority, for extending the exception to parties, who, *knowing* that they have not any present estate to convey, *take upon themselves to sell in the speculative belief that they will be able to procure an interest and title before they are called upon to execute the conveyance.* There is an obvious difference between an owner, who knows that he alone is entitled to an estate and has a right to sell it, although he may fail to make out a sufficient title, and the person who not having the estate takes upon him to sell on the expectation of acquiring the estate in time and making out a title." Even if the majority of the Court in that case, and the jury by their finding, were right in holding that there was there a reasonable expectation, as distinguished from a speculative belief, I can see nothing of the kind in the present case, which therefore, in my opinion, is not affected by the case of *Sikes* v. *Wild* (2), even assuming that case to have been correctly decided. The present case was not argued in the Exchequer Chamber in consequence of an understanding between Counsel that the case of *Engel* v. *Fitch* (3) bore so closely upon it that it was desirable to proceed at once to your Lordships' House after a formal judgment for the Defendants, in order that the whole subject might be freely discussed. Upon a careful perusal of the case of *Engel* v. *Fitch* (3), I am unable to perceive that it bears so closely upon the present case as appears to have been supposed at that time. Both in the Queen's Bench and in the Court of Error,

(1) 2 W. Bl. 1078.
(2) 1 B. & S. 587; 4 Ibid. 421.
(3) Law Rep. 3 Q. B. 314; in error, 4 Ibid. 659.

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the case was decided upon the ground that the breach of contract having arisen from the *neglect* of the Defendants to do an act within their power, in order to complete the title, and not from *inability* to make a title, *Flureau* v. *Thornhill* (1) did not apply. In the present case I do not think that the facts shew that the Defendants were in a position, even if they had so chosen, to get over the difficulty which existed, but on the contrary that it was a matter wholly beyond their control. The case, however, is of great value, as shewing beyond all question that the rule in *Flureau* v. *Thornhill* (1) is a rule wholly confined to cases of *inability* to make a title, and not to breaches of contract *in respect of the sale of real property* from whatsoever cause arising. Lord Chief Baron *Kelly* in *Engel* v. *Fitch* (2) speaks, as I venture to think, with correctness, of the rule as "a qualification of the rule of Common Law, founded entirely on the difficulty that a vendor often finds in making a title to real estate not from any default on his part, but from his ignorance of the strict legal state of his title."

I come now to consider the judgments of the learned Barons of the Exchequer in the present case. Those judgments were delivered without time taken to consider, and they are not all founded upon the same grounds. Mr. Baron *Martin* passes over what I feel to be the main difficulty in the Defendants' way by the observation "the Defendants were willing to complete their contract, and only failed because they failed to get the consent which they might reasonably have supposed there would be no difficulty in getting." It appears to me, on the contrary, that, under the circumstances of the case, there was nothing to justify them in making such a contract with the knowledge they possessed, without communicating the present defect of their title to the intending purchaser, and certainly nothing to justify them in assuming that that defect would be cured. The judgment of Mr. Baron *Channell* seems to proceed upon the supposition that the rule in *Flureau* v. *Thornhill* (1) applies wherever *fraud* is not suggested, for which position he says that *Pounsett* v. *Fuller* (3) and *Sikes* v. *Wild* (4) seem to be strong authorities. To this I do not

(1) 2 W. Bl. 1078.
(2) Law Rep. 4 Q. B. 666.
(3) 17 C. B. 660.
(4) 1 B. & S. 587; 4 Ibid. 421.

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assent, for the reasons explained above. Mr. Baron *Cleasby* proceeds on a wholly different ground from his learned brethren, and bases his decision on the ground that the Defendants having merely contracted to sell "their interest" had in fact only sold their interest, such as it was, in a contract relative to the property, and not any legal interest whatever. But, as pointed out by Mr. Baron *Martin* in his judgment, this view of the case, if correct, would shew that the Defendants were not liable for any breach of contract at all, a point never suggested on their behalf, and I think it plain that the meaning of the contract cannot be so restricted. The very words "We offer to sell you our interest," must, I think, be construed as an offer to sell something which they had an unrestricted right to sell, and the subsequent words as to payment of £2500, "to be paid in cash on *our handing you a transfer of the said royalty*," are, in my opinion, quite inconsistent with the supposition that both parties could be held to have contracted deliberately upon any other basis than that the Defendants had an absolute right to convey, subject only to unanticipated difficulties in making out the titles.

For these reasons I am of opinion that the rule in *Flureau* v. *Thornhill* (1) is not applicable to the present case, and that the Plaintiffs are entitled to such damages for the loss of their bargain as the arbitrator appointed may assess.

MR. BARON PIGOTT.

MR. BARON PIGOTT:—

In answer to the questions submitted by your Lordships to the Judges, I am of opinion, first, that upon a contract for the sale of real estate where the vendor, *without his default*, is unable to make a good title, the purchaser is not by law entitled to recover *damages for the loss of his bargain*.

Secondly, that the actual possession of the property, the subject of the contract, is not *essential* to bring the case within the rule laid down in *Flureau* v. *Thornhill* (1). And, lastly, that the circumstances of the present case do not distinguish it from the case of *Flureau* v. *Thornhill* (1).

I base my answers to the first and second questions of your

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Lordships upon the decision in *Flureau* v. *Thornhill* (1), which is, in my opinion, both good law and good sense. I think that it would have been impolitic and unjust to allow damages to be recovered in such a case for the loss of the bargain.

The Court considered it an exceptional case, taking it out of the ordinary rule as to damages, but confining the exception to cases where (to use the words of the Chief Justice) "*without fraud,*" *a vendor was incapable of making a good title to real estate.* If the vendor by his own default had caused the breach, that would be, I conceive, in the nature of a fraud upon the vendee, and would disentitle the former to the benefit of the exception.

The reasons for such an exception seem both evident and cogent. No man, not a lawyer, could, from the difficulty of the subject know, in the majority of cases, the state of his title to land, and this was well known to both vendors and purchasers; hence *Blackstone,* J., said, "these contracts are upon condition that the vendor has a good title," implying that it was at that time a well understood term of such contracts within the contemplation of all parties. Without such a term being implied every man must have expressed it in his contract, or have incurred beforehand an expensive investigation of his title; or another very probable result would have been that such contracts would be unduly discouraged by the fear of consequences which vendors could not foresee. Such being the circumstances under which these contracts were entered into, it was, in my opinion, highly reasonable that the Court should infer that the parties contracted with reference to them, and that the damages for a breach should be assessed upon the principle thus contemplated by both. I submit also that the rule was intended to be a broad and plain one, making no distinction, and calling for none, whether the vendor was at the time of his contract in possession or not.

The case thus decided one hundred years ago, has been, with very slight exceptions, acted upon ever since. Its soundness has been generally admitted and approved, and it must be taken, I think, that all subsequent contracts for the sale of real estates have

(1) 2 W. Bl. 1078.

proceeded upon the law thus established. Perhaps many such contracts may be now in existence, and it would not only be hard to apply to them an *ex post facto* law, but, I venture to think, that only the most irresistible reasons should induce your Lordships to disturb that decision.

In the year 1826, *Hopkins* v. *Grazebrook* (1) seems to have cast some disparagement upon *Flureau* v. *Thornhill* (2), but that case went in the result no farther than to engraft an exception upon it.

The facts were that the Defendant had put up for sale part of an estate which belonged to one *Hill*. *Hill* had contracted for the sale of it to *Harwood*, and Defendant had contracted to purchase the same from *Harwood*. The case only states that "a misunderstanding arose between *Hill* and *Harwood*," and the conveyance to the latter was never executed. In consequence of this dispute, Defendant (who acted *bonâ fide* throughout) was unable to complete his contract, and was sued for the breach of it. It is not very clearly to be collected from the case what the dispute was about; but assuming, as I do from the argument and judgments, that it was upon defective title, I venture humbly to submit that the distinction has no real foundation.

The Chief Justice *Abbott* says, "The Defendant unfortunately put the estate up to auction before he got a conveyance;" and *Bayley*, J., says, "The case of *Flureau* v. *Thornhill* (2) is very different, for here the vendor had nothing but an equitable title."

But no reason is given why a person may not as properly contract for the sale of an estate to which he is entitled in Equity as well as in Law. He is (*ex hypothesi*) entitled to the thing he contracts to sell (which is the estate), and he is bound to perform his contract. The contract does not express, nor necessarily assume, that he is actually in possession of the estate, or anything more than that he is so far entitled to possession that he will be able to give it at the proper time to his vendee, nor does it assume that he has had it conveyed in law to him. It is a contract to convey and give possession within the time fixed, or within a reasonable time, subject to the implied condition that

(1) 6 B. & C. 31. (2) 2 W. Bl. 1078.

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the title be not objected to by the purchaser. If this be the whole effect of the contract, there seems to be no ground for saying, as the Chief Justice did, "that he was bound to have had a conveyance before he put it up to auction;" or in the language of *Bayley*, J., that "the purchaser might presume that he had had a satisfactory title, and if he had not, that he may very fairly be compelled to pay the loss which the purchaser sustains by not having that for which he contracted." But a reason altogether different from these is ascribed for this decision of Chief Justice *Abbott* in the judgment of *Sikes* v. *Wild* (1), viz., that the Chief Justice thought it illegal and against public policy to contract to sell things of which the vendor was not in possession. I need not say this is a ground hardly tenable at the present day. I must, however, refer your Lordships to the judgment of the Court of Queen's Bench in the case of *Engel* v. *Fitch* (2) in 1868, with reference to *Hopkins* v. *Grazebrook* (3). The Lord Chief Justice certainly says, "It stands upon a perfectly intelligible and sound foundation;" and he adds "there is an obvious difference between the case of a man who, being in possession and the undoubted owner of real property, is unable to make out a marketable title, and that of one who not being the owner, but having only a contract for the purchase, takes upon himself to sell it to another as his own, and as if the title were his to convey" (&c.) Now, with great respect to so high an authority, it seems to me that the alternatives here presented come to very much the same result; viz., who is the owner of the estate, and as such entitled by law to deal with it in contract?

The vendor has ceased to have the power of disposing of it, while the vendee may have good reason to believe that the title is unobjectionable, and that he can with perfect *bona fides* offer it for sale. Why may he not do so? It is difficult to see; for if he were in possession his title may prove defective, and it is only an equal chance that it may prove so where he is entitled to possession by contract.

In *Walker* v. *Moore* (4), *Littledale*, J., said, "When a contract

(1) 1 B. & S. 587.
(2) Law Rep. 3 Q.B. 314; in error, 4 Ibid. 659.
(3) 6 B. & C. 31.
(4) 10 B. & C. 422.

for the purchase of lands is made, each party cannot but know that the title may prove defective, and must be taken to proceed upon that knowledge;" and *Parke*, J., says, "in the absence of any express stipulation about it, the parties must be considered as content that the damages in the event of the title proving defective shall be measured in the ordinary way, and that excludes the claim of damages on account of the supposed goodness of the bargain."

I would refer especially to another case in which *Flureau* v. *Thornhill* (1) was followed, viz., *Pounsett* v. *Fuller* (2). It differed in its circumstances in this important particular, that there the Defendant had only an agreement in writing but not under seal, for a right of shooting over a manor for four years. He contracted to sell this right to the Plaintiff (together with a furnished cottage which does not seem to have been held under the agreement with the shooting). But in consequence of the objection of his lessor the Defendant was unable to complete his contract for the shooting. The Court said that it fell within the decisions of *Flureau* v. *Thornhill* (1) and *Walker* v. *Moore* (3), because the Defendant was not to blame, and the judgment of Chief Justice *Jervis* goes on to say, "though legally and technically he had not acquired a right to sell what he professed to sell to the Plaintiff since he had no agreement under seal, still he, as a layman, might fairly believe that as he had signed a written agreement he had a right to sell, and was therefore not to blame for entering into a contract to sell." Mr. Justice *Cresswell* indeed assumes that the Defendant was in possession of the shooting; but the judgment of Mr. Justice *Williams*, whilst it goes farther in the expressions of approbation of *Flureau* v. *Thornhill* (1), as laying down a rule called for by the position of the parties to such contracts, goes on to say, "Here it is true Defendant had nothing but an *equitable title, but he did not know that he had not a perfectly good title.*"

This was followed by the case of *Sikes* v. *Wild* (4) in the Queen's Bench, to the same effect; and that case was affirmed on error.

The Defendants were devisees under the will of *E.* upon trust to

(1) 2 W. Bl. 1078.
(2) 17 C. B. 660.
(3) 10 B. & C. 422.
(4) 1 B. & S. 587; in error, 4 Ibid. 421.

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sell the land, and to pay out of the interest of the proceeds £100 per annum to his wife. The estate was held subject to a settlement by which *the legal estate was in trustees* for securing that sum to her. The Defendants offered the land for sale, believing that the wife would, in accordance with advice, concur in the conveyance of the land free from incumbrance. After sale and a deposit paid she refused to concur, and the Plaintiff claimed damages for the loss of his bargain. In the Court of Queen's Bench Justices *Wightman* and *Blackburn* held that it came within the rule of *Flureau* v. *Thornhill* (1), and their judgment was affirmed by the Exchequer Chamber. The Lord Chief Justice *Cockburn* in the Court below, held that it came within the exception engrafted upon it by *Hopkins* v. *Grazebrook* (2), but the whole of the Judges in both Courts, nine in number, approved of the rule in *Flureau* v. *Thornhill* (1).

I beg leave to refer your Lordships to the judgment delivered by Mr. Justice *Blackburn* in *Sikes* v. *Wild* (3), both for the very exhaustive review which it takes of the whole of the cases bearing upon this subject, and especially for the observations there made upon *Hopkins* v. *Grazebrook*, in which I entirely agree. The latter passage is this (4), "We think that it will be worthy of the consideration of any Court competent to review that case, whether the strong opinion of Lord *St. Leonards*, reported in his 13th edition of Vendors and Purchasers, p. 301, does not shew that the general understanding of conveyancers has been misapprehended," and he adds "it is impossible to say, as a matter of law, that there is misconduct in putting up property for sale without describing every material fact, as if it was a case of marine insurance." The case was decided in Trinity Term, 1861; and in the edition of Vendors and Purchasers in the following year, the learned author in his commentary upon the decision writes thus, "This seems to be the true rule; it is a point which, whilst at the Bar, I should have treated as beyond doubt." Upon these authorities, and for these reasons, I submit that both the first and second questions of your Lordships should be answered in the affirmative in point of law.

(1) 2 W. Bl. 1078.
(2) 6 B. & C. 31.
(3) 1 B. & S. 587; in error, 4 Ibid. 421.
(4) 1 B. & S. 594, 595.

The third question of your Lordships depends upon the facts, which are, that *Anthony Hill* was possessed of a mine called *Walter's Royalty*, by virtue of an agreement dated the 19th of October, 1861, for a term of twenty-one years. The agreement contained a clause against assignment or subletting without the consent of the lessors in writing first had. *Anthony Hill* died on the 2nd of August, 1862. His executors in August, 1863, contracted with Defendants for the sale to them of (*inter alia*) *Miss Walter's Royalty*.

This purchase had not been completed on the 17th of October, 1867. The executors applied to the lessors for, and they were willing to give, consent to the above assignment, provided the Defendants would execute a duplicate of it. A consent in writing was accordingly prepared in duplicate, and on the 16th of June, 1865, one part was executed by the lessors, and retained in the hands of their solicitor. The other part was sent on the 15th of June, 1865, to Messrs. *Upton & Co.*, the solicitors for the executors, in order that they might obtain the signature of the Defendants, and then exchange it for the one executed by the lessors. The duplicate was about that time sent by Messrs. *Upton* to Defendants' solicitors for execution by the Defendants. On two or three occasions the lessors' solicitors requested the solicitors of the executors to obtain the execution by the Defendants of this duplicate, and about the 11th of October, 1865, intimated that the lessors would withdraw their consent unless the duplicate was returned executed in a few days. The solicitors of the executors wrote on the 11th of October to the solicitors of the Defendants a letter.

The duplicate remained unexecuted in the hands of Defendants' solicitors on the 17th of October, 1867, when the agreement now in question was entered into. On that morning one of the Plaintiffs saw the Defendant *Fothergill*, with the view to purchase *Miss Walter's Royalty;* they discussed terms and entered into the agreement on that date, the 17th of October, 1867.

Before the 17th of October, Mr. *Fothergill* had been told that it would be necessary to obtain the consent of the lessors for the assignment to third parties of the Defendants' interest in the royalty, and no mention was made by him to Mr. *Paterson* of the necessity for such consent. The case states as a reason for this

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"either it did not cross his mind, or if it did occur to him, he forbore to mention it, feeling sure that no difficulty would arise with respect to such consent, and that it was, therefore, a matter of no importance."

In the result, after every endeavour had been made to induce the lessors to give their consent to the assignment, their consent was finally refused, and the Defendants were, therefore, unable to complete their contract with the Plaintiffs. From these statements I infer that the Defendants acted *bonâ fide* in making the contract with the Plaintiffs, that they had an equitable title to the mine at the time, and that they were prevented from carrying out the completion of the contract without any fraud or default (in the nature of misconduct) on their part, but in consequence solely of a defect in their title, which they had not the power to cure. The utmost that can be urged against them is a knowledge that they required the consent of the lessor, which they did not communicate, but there is no pretence for saying that they knew or thought that they were not sure to obtain it. As they honestly believed that they should get it at the time when they sold, it seems to me to be conclusive of the case.

Upon the whole, therefore, I beg to state it as my opinion that the exception as to damages which was established by *Flureau* v. *Thornhill* (1) applies to the present case.

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LORD CHELMSFORD:—

My Lords, this appeal brings in review before your Lordships the case of *Flureau* v. *Thornhill* (1) and other cases which have engrafted exceptions upon it; and the first question to be considered is whether that case was rightly decided. The decision took place very nearly a century ago, in the year 1775, and has been followed ever since; not, however, without an occasional expression of doubt as to its soundness. Should your Lordships happen to share in this doubt, you would be extremely reluctant to disturb the rule which it laid down for the assessment of damages upon contracts for the sale of real estates, and which has been so long acted upon, unless you were clearly convinced that it is erroneous and ought no longer to be maintained.

(1) 2 W. Bl. 1078.

Now, the rule established by *Flureau* v. *Thornhill* (1) is, that upon a contract for the purchase of a real estate, if the vendor, without fraud, is incapable of making a good title, the intended purchaser is not entitled to any compensation for the loss of his bargain. The case is very shortly reported. Lord Chief Justice *De Grey* merely laid down the rule, without giving any reason for it. But Mr. Justice *Blackstone* said this: "These contracts are merely upon condition frequently expressed, but always implied, that the vendor has a good title."

The rule and the reason for it have been adopted and followed in subsequent cases. In *Walker* v. *Moore* (2), where the Plaintiff contracted with the Defendant for the purchase of a real estate; the vendor, acting *bonâ fide*, delivered an abstract shewing a good title, and the Plaintiff, before he compared it with the original deeds, contracted to sell several portions of the property at a considerable profit. Upon an examination of the abstract with the deeds it was found that the title was defective. The Plaintiff refused to complete his purchase, and brought his action claiming, amongst other damages, the profit that would have accrued to him from the re-sale of the property. It was held that he was not entitled to these damages. Mr. Justice *Parke* said: "A jury ought not, in the case of a vendor in possession, to give any other damages in consequence of a defect being found in the title, than those which were allowed in *Flureau* v. *Thornhill* (1), which was recognised in *Johnson* v. *Johnson* (3), *Bratt* v. *Ellis* (4), and *Jones* v. *Dyke* (5). In the absence of any express stipulation about it, the parties must be considered as content that the damages in the event of the title proving defective shall be measured in the ordinary way, and that excludes the claim of damages on account of the supposed goodness of the bargain."

The same learned Judge recognised the authority of *Flureau* v. *Thornhill* (1) in the case of *Robinson* v. *Harman* (6). He there said:—"The case of *Flureau* v. *Thornhill* (1) qualified the rule of the Common Law that where a party sustains a loss by reason of a

(1) 2 W. Bl. 1078.
(2) 10 B. & C. 416.
(3) 3 B. & P. 162.
(4) Sudg. V. & P. 11th Ed. Ap. No. 4.
(5) Ibid. No. 5.
(6) 1 Ex. 855.

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breach of contract he is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed." Again, in *Pounsett* v. *Fuller* (1), the Court, following the rule in *Flureau* v. *Thornhill* (2), held that where a vendor failed to make a good title pursuant to his contract, the purchaser (in the absence of fraud or misrepresentation on the part of the vendor) was not entitled to damages for the loss of his bargain. Mr. Justice *Cresswell*, in delivering his opinion, said:—"We are not called upon here to investigate the grounds upon which the decision in *Flureau* v. *Thornhill* (2) proceeded, or to pronounce any opinion as to the wisdom or the expediency of the rule there laid down. It is enough for us to say that it has been received and acted upon in too many subsequent cases to allow us now to call it in question." And in the recent case of *Sikes* v. *Wild*, the Court of Queen's Bench (3) and the Court of Exchequer Chamber (4) adopted the rule and acted upon it.

In a more recent case of *Engel* v. *Fitch* (5), to which I shall presently have occasion more particularly to refer, Lord Chief Justice *Cockburn*, in an elaborate judgment, expressed his opinion that the case of *Flureau* v. *Thornhill* (2) was unsatisfactory, and gave his sanction to Lord Chief Justice *Abbott's* doubt as to the soundness of the decision in that case.

There is, perhaps, some difficulty in ascertaining the exact grounds of the judgment in *Flureau* v. *Thornhill* (2); but, in addition to those which have been previously assigned, it seems to me that the following considerations may be suggested as in some degree supporting the correctness of the decision:—"The fancied goodness of the bargain" must be a matter of a purely speculative character, and in most cases would probably be very difficult to determine, in consequence of the conflicting opinions likely to be formed upon the subject; and even if it could be proved to have been a beneficial purchase, the loss of the pecuniary advantage to be derived from a re-sale appears to me to be a consequence too remote from the breach of the contract. I am aware that in *Engel* v. *Fitch* (5), where, after the contract and before the breach

(1) 17 C. B. 660.
(2) 2 W. Bl. 1078.
(3) 1 B. & S. 587.
(4) 4 B. & S. 421.
(5) Law Rep. 3 Q. B. 314; in error, 4 Ibid. 659.

of it, the purchaser contracted for a re-sale at an advance of £105, the Court of Queen's Bench and the Court of Exchequer Chamber, though pressed with the decision in *Hadley* v. *Baxendale* (1), held that "if an increase in value has taken place between the contract and the breach, such an increase may be taken to have been in the contemplation of the parties within the meaning of that case." But it must be borne in mind that this question as to damages depends, as Baron *Alderson* said in *Hadley* v. *Baxendale* (1), upon what "may reasonably be supposed to have been in the contemplation of *both* parties at the time they made the contract as the probable result of the breach of it." Now, although the purchaser in *Engel* v. *Fitch* (2), when he entered into the contract, may have contemplated a re-sale at an advance, it is not at all likely that the loss of this profit should have occurred to the vendor as the probable result of the breach of his contract. The Judges were no doubt influenced by the fact of the profitable re-sale having actually taken place, and were, in consequence, drawn aside from considering what must have been in the minds of both parties at the precise time when they made the contract.

The decision in *Flureau* v. *Thornhill* (3) derives great additional authority from the opinion of Lord *St. Leonards*, who, in his work on the Law of Vendors and Purchasers (4), considers that it was rightly decided.

The almost unanimous approval of the decision in *Flureau* v. *Thornhill* (3) was broken in upon by an expression of disapprobation from Chief Justice *Abbott* in the case of *Hopkins* v. *Grazebrook* (5), to which I have already alluded. He there said: "Upon the present occasion I will only say, that if it is advanced as a general proposition that where a vendor cannot make a good title the purchaser shall recover nothing more than nominal damages, I am by no means prepared to assent to it. If it were necessary to decide that point I should desire to have time for consideration." As the case of *Hopkins* v. *Grazebrook* (5) was one which, according to the opinion of the Court, was not within the operation of the rule in *Flureau* v. *Thornhill* (3), there was no occasion for this

(1) 9 Ex. 341.
(2) Law Rep. 3 Q. B. 314; in error, 4 Ibid. 659.
(3) 2 W. Bl. 1078.
(4) 14th Ed., p. 360.
(5) 6 B. & C. 31.

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passing reflection upon that case, which had been then silently acquiesced in for fifty years.

In *Hopkins* v. *Grazebrook* (1), a person who had contracted for the purchase of an estate, but had not obtained a conveyance, put up the estate for sale in lots by auction, and engaged to make a good title by a certain day, which he was unable to do, as his vendor never made a conveyance to him, and it was held that a purchaser of certain lots at the auction might, in an action for not making a good title, recover not only the expenses which he had incurred, but also damages which he sustained by not having the contract carried into effect. Chief Justice *Abbott* said: "The Defendant had unfortunately put the estate up to auction before he got a conveyance. He should not have taken such a step without ascertaining that he would be in a situation to offer some title, and having entered into a contract to sell without the power to confer even the shadow of a title, I think he must be responsible for the damage sustained by a breach of his contract." And Justice *Bayley* said: "The case of *Flureau* v. *Thornhill* (2) is very different from this, for here the vendor had nothing but an equitable title."

The decision itself in *Hopkins* v. *Grazebrook* (1) cannot be supported. The seller in that case had undoubtedly an equitable estate in respect of which he had a right to contract. Therefore the language of Chief Justice *Abbott*, that "the Defendant had entered into a contract to sell without the power to confer even the shadow of a title," is not warranted by the circumstances of the case, as the Defendant could certainly have assigned his equitable estate; and thus the sole ground upon which he held him responsible for damages entirely failed. But although the facts in *Hopkins* v. *Grazebrook* (1) did not justify the decision, yet the case has always been treated as having introduced an exception to the rule in *Flureau* v. *Thornhill* (2), and as having withdrawn from its operation a class of cases where a person, knowing that he has no title to real estate, enters into a contract for the sale of it. It is not correct to say with Lord *St. Leonards* in his Vendors and Purchasers (3), that *Hopkins* v. *Grazebrook* (1) has

(1) 6 B. & C. 31. (2) 2 W. Bl. 1078.
(3) 14th Ed. p. 359.

not been followed. It has been recognised in several cases since, and in one to which I shall presently refer it has been expressly followed. In *Robinson* v. *Harman* (1), already mentioned as having sanctioned the decision in *Flureau* v. *Thornhill* (2), Baron *Parke* said: "The present case comes within the rule of the Common Law, and I cannot distinguish it from *Hopkins* v. *Grazebrook*" (3). And Baron *Alderson* and Baron *Platt* expressed the same opinion. In *Pounsett* v. *Fuller* (4), *Hopkins* v. *Grazebrook* (3) was treated as a valid authority by all the Judges, the question which they considered being whether the case fell within *Flureau* v. *Thornhill* (2), or the exception in *Hopkins* v. *Grazebrook* (3), and they decided that it was within the former case.

But in the case of *Engel* v. *Fitch* the Court of Queen's Bench (5), and afterwards the Exchequer Chamber (6), proceeded expressly on the cases of *Hopkins* v. *Grazebrook* (3) and *Robinson* v. *Harman* (1), the Chief Baron, quoting the very words of the Lord Chief Justice, and relying on those cases. In that case the mortgagees of a house sold it by auction to the Plaintiff, the particulars of sale stating that possession would be given on completion of the purchase. The purchaser resold the house at an advance in the price to a person who wanted it for immediate occupation. The mortgagor refused to give up the possession. The mortgagee could have ousted him by ejectment, but refused to do so on the ground of the expense. The purchaser brought an action upon the contract of sale, and it was held, that as the breach of contract arose not from inability of the Defendants to make a good title, but from their refusal to take the necessary steps to give the Plaintiff possession pursuant to the contract, he could recover not only the deposit and the expenses of investigating the title, but damages for the loss of his bargain; and that the measure of such damages was the profit which it was shewn he would have made upon a re-sale. It was after this decision in *Engel* v. *Fitch* that the Plaintiffs in Error declined to argue the present case in the Exchequer Chamber, as the authorities on the subject could only be freely reviewed by a higher tribunal.

(1) 1 Ex. 850.
(2) 2 W. Bl. 1078.
(3) 6 B. & C. 31.
(4) 17 C. B. 660.
(5) Law Rep. 3 Q. B. 314.
(6) Law Rep. 4 Q. B. 659, 664.

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The case therefore comes to your Lordships' House without the advantage of the opinions of the learned Judges of that Court.

Notwithstanding the repeated recognition of the authority of *Hopkins* v. *Grazebrook* (1), I cannot, after careful consideration, acquiesce in the propriety of that decision. I speak, of course, of the exception which it introduced to the rule established by *Flureau* v. *Thornhill* (2), with respect to damages upon the breach of a contract for the sale of a real estate, for as to the case itself not falling within the exception to the rule (if any such exists), I suppose no doubt can now be entertained. The exception which the Court, in *Hopkins* v. *Grazebrook* (1), engrafted upon the rule in *Flureau* v. *Thornhill* (2), has always been taken to be this: that in an action for breach of a contract for the sale of a real estate if the vendor at the time of entering into the contract knew that he had no title, the purchaser has a right to recover damages for the loss of his bargain.

In *Sedgwick* on Damages (3), mentioned by Mr. Baron *Martin*, in his judgment in this case, after a reference to the general rule as to damages, it is said, "To this general rule there undoubtedly exists an important exception which has been introduced from the civil law in regard to damages recoverable against a vendor of real estate who fails to perform and complete the title. In these cases the line has been repeatedly drawn between parties acting in good faith and failing to perform because they could not make a title, and parties whose conduct is tainted with fraud and bad faith. In the former case, the Plaintiff can only recover whatever money has been paid by him with interest and expenses. In the latter, he is entitled to damages for the loss of his bargain. The exception cannot, I think, be justified or explained on principle, but it is well settled in practice." I quite agree that the distinction as to damages in cases of contracts for the sale of real estate, where the vendor acts *bonâ fide*, and where his conduct is tainted with fraud or bad faith, is not to be "justified or explained on principle."

I fully agree in the doubt expressed by Mr. Justice *Blackburn*, in *Sikes* v. *Wild* (4), as to the soundness of the exception in

(1) 6 B. & C. 31.
(2) 2 W. Bl. 1078.
(3) 4th Ed. p. 234.
(4) 1 B. & S. 594.

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Hopkins v. *Grazebrook* (1), and in the observations which follow the expression of that doubt. The learned Judge said, "I do not see how the existence of misconduct can alter the rule by which damages for the breach of a contract are to be assessed, it may render the contract voidable on the ground of fraud, or give a cause of action for deceit, but surely it cannot alter the effect of the contract itself. And if it be said that the rule depends upon an implied condition resulting from the general understanding of vendors and purchasers (which is the ground taken by Mr. Justice *Parke* in *Walker* v. *Moore* (2), and I think the true one), and that the usage is such that this implied condition excludes such cases as *Hopkins* v. *Grazebrook* (1), I think that it will be worthy of the consideration of any Court competent to review that case whether the strong opinion of Lord *St. Leonards*, repeated in the 13th edition of Vendors and Purchasers, does not shew that the "general understanding of conveyancers has been misapprehended." In the 14th edition of his work (3), Lord *St. Leonards* quotes the whole of the above passage from Mr. Justice *Blackburn's* judgment, and adds, "this seems to be the true rule, it is a point which, whilst at the Bar, I should have treated as beyond doubt."

Upon a review of all the decisions on the subject, I think that the case of *Hopkins* v. *Grazebrook* (1) ought not any longer to be regarded as an authority. Entertaining this opinion, I can have no doubt that the judgment of the Court of Exchequer in the present case is right, whether it falls within the rule as established by *Flureau* v. *Thornhill* (4), or is to be considered as involving circumstances which have been regarded as removing cases from the influence of that rule; because I think the rule as to the limits within which damages may be recovered upon the breach of a contract for the sale of a real estate must be taken to be without exception. If a person enters into a contract for the sale of a real estate knowing that he has no title to it, nor any means of acquiring it, the purchaser cannot recover damages beyond the expenses he has incurred by an action for the breach of the contract; he can only obtain other damages by an action for deceit.

(1) 6 B. & C. 31.
(2) 10 B. & C. 416.
(3) Pages 360, 361.
(4) 2 W. Bl. 1078.

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It is only necessary to add that, in my opinion, if there were any exceptional cases from the rule in *Flureau* v. *Thornhill* (1), the present case would not fall within any of them, but is within the rule itself. The Respondents, when they entered into the contract for the sale of *Miss Walter's Royalty*, had an equitable title to the mine which they might have perfected by obtaining the lessors' consent to the assignment to them. This consent had not been obtained at the time the contract was entered into, and the fact was not communicated to the intended purchaser. The reason for this non-communication is stated in the case to be, that "either it did not cross the mind of the Respondent *Fothergill*, or, if it did occur to him he forbore to mention it, feeling sure that no difficulty would arise with respect to such consent, and that it was therefore a matter of no importance." There is no reason to think that the Respondents were not acting throughout under a *bonâ fide* belief that the lessors' consent might be obtained at any time upon application. They were prevented performing their contract, not from any fraud or wilful act on their part, but by an unexpected defect in their title which it was beyond their power to cure.

The case falls precisely within the terms of the rule as stated in *Flureau* v. *Thornhill* (1); and therefore, in my opinion, the judgment appealed from is right and ought to be affirmed.

LORD HATHERLEY:—

My Lords, I entirely concur in the view which has been expressed by my noble and learned friend who has just addressed your Lordships.

If the question in this case depends entirely upon the case of *Flureau* v. *Thornhill* (1), it can scarcely, in my judgment, after the lapse of time which has taken place since that decision, be argued at your Lordships' Bar. I certainly remember myself, now more than fifty years ago, when I was reading in Chambers, to have heard that it was considered as a settled rule that no damages could be recovered for a loss of the benefit of a bargain in case a good title could not be made out by a vendor to his purchaser. That was then considered as settled by the decision in *Flureau* v. *Thornhill* (1), which had taken place forty-nine years before that

(1) 2 W. Bl. 1078.

time; that would make it altogether ninety-nine years from the present time. Therefore, my Lords, for ninety-nine years the rule has prevailed as settled by *Flureau* v. *Thornhill* (1), and it has affected and governed, I may say, thousands and thousands of transactions annually, for undoubtedly the contracts for the sale of real estate may be reckoned by thousands annually, and nobody, I apprehend, has as yet ever contradicted it. Whatever may have been the expressions of dissatisfaction that have been uttered with regard to that decision, nobody has come to the conclusion that the rule as established in *Flureau* v. *Thornhill* (1) should be overthrown. Now, my Lords, upon a much less extensive series of practice by conveyancers, your Lordships' House has been in the habit of acting; but in this case there is not merely the practice of conveyancers, but the common dealings of mankind, which, continuing year after year, as I have said, in many thousands of cases, have required the practice to be put into effect. As far, therefore, as this case falls within the rule in *Flureau* v. *Thornhill* (1) it must be considered as one beyond all doubt.

As regards the case of *Engel* v. *Fitch* (2) (I do not speak for the moment with regard to the case of *Hopkins* v. *Grazebrook* (3)), that certainly was a very peculiar case, whether the course taken by the Court was correct or not in the decision upon the point of damages arising in consequence of the loss of the benefit of the contract. The vendor in that case was bound by his contract, as every vendor is bound by his contract, to do all that he could to complete the conveyance. Whenever it is a matter of conveyancing, and not a matter of title, it is the duty of the vendor to do everything that he is enabled to do by force of his own interest, and also by force of the interest of others whom he can compel to concur in the conveyance. In *Engel* v. *Fitch* (2) a man having sold his estate, but having failed to do everything in his power to compel possession of the estate to be given up, and being in a condition in which, if a bill had been filed in Equity, he would have been compelled by the Court to take proceedings in order to obtain the delivery up of possession according to his contract with his vendee, he refused to take any such proceedings what-

(1) 2 W. Bl. 1078.

(2) Law Rep. 3 Q. B. 314; in error, 4 Ibid. 659.

(3) 6 B. & C. 31.

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ever simply upon the ground of the expense it might entail on him. There could be no doubt whatever in that case that he was acting in gross violation of his contract which he had the power of performing. Whether or not the proper mode of correcting that abuse was by giving damages to the Plaintiff in respect of the loss of his contract, I will not stop to inquire. But it is quite clear that that case was exceedingly different from the case of *Flureau* v. *Thornhill* (1), where it turned out on investigation that the vendor had no legal title.

The reasons given for the judgment in *Flureau* v. *Thornhill* (1) were certainly not altogether satisfactory, because the Lord Chief Justice is said upon that occasion to have stated *simpliciter*, without alleging any ground whatever for the decision, that upon a contract for a purchase, if the title proves bad and the vendor is (without fraud) incapable of making a good one, the purchaser is not entitled to any damages for the fancied goodness of the bargain; to which Mr. Justice *Blackstone* added that "these contracts are merely upon a condition frequently expressed, but always implied, that the vendor has a good title." That is scarcely a correct representation of the case, because if the vendor's contract with his vendee was on the condition that he had a good title, then in the event of the title failing, there would be no action for damages whatever, and there would be no power in the vendee to do that which he is always entitled in equity to do, namely, to insist upon having the title good or bad, if he should be so minded; if the title is defective, and if it is so stated, the vendee is always allowed to have the benefit of the contract.

Therefore the reason is not that the contract is made upon that condition, but the foundation of the rule has been already more clearly expressed by my noble and learned friend who has preceded me in saying that, having regard to the very nature of this transaction in the dealings of mankind in the purchase and sale of real estates, it is recognised on all hands that the purchaser knows on his part that there must be some degree of uncertainty as to whether, with all the complications of our law, a good title can be effectively made by his vendor; and taking the property with that knowledge, he is not to be held entitled to recover any loss

(1) 2 W. Bl. 1078.

on the bargain he may have made, if in effect it should turn out that the vendor is incapable of completing his contract in consequence of his defective title. All that he is entitled to is the expense he may have been put to in investigating that matter. He has a right also to take the estate and complete the purchase with that defective title if he thinks proper so to do, but he is held to have bargained with the vendor upon the footing that he (the vendee) shall not be entitled, under all circumstances, to have that contract completed, and therefore he is not put in a position under such a contract to make a re-sale before the matter has been fully investigated, and before it is ascertained whether or not the title of his vendor is a good one.

A contract for a sale of real estate is very different indeed from a contract for a sale of a chattel, where the vendor must know what his right to the chattel is, or at all events is taken to know what his right to the chattel is. And, farther, in the case of chattels, we well know, as regards the larger part of those contracts at least, that the chattels are purchased with a view to re-sale, and therefore the whole transaction between the two parties is upon the footing and upon the faith, that all the expense or loss that may be incurred, whether it be by the vendee being put to the expense of making any inquiry upon the subject, or whether it be by a loss of profit which he might have obtained if the chattel had been delivered to him, is within the contemplation of both parties, and that is therefore assumed to be the actual contract which the vendor wished to enter into.

The only question therefore really remaining in the case, assuming that your Lordships will not think it right to act contrary to the practice which has prevailed ever since the decision of *Flureau* v. *Thornhill* (1), is, whether or not the present case can be distinguished in any way from that decision. It appears to me, my Lords, that there is nothing whatever in the case to distinguish it. The contract was made *bonâ fide* (there is no allegation to the contrary) by the vendor, in the genuine belief that he had a good title. The circumstance that there had been some litigation before as between him and his original lessors, from whom he derived the lease which he sold, as to whether or not they

(1) 2 W. Bl. 1078.

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would give their consent to an assignment, is not, as it appears to me, a circumstance which necessarily implies that there was any want of good faith on his part in offering to sell the property, he being in the full belief that his lessors might reasonably assent, and being consequently in the full belief that that assent would be given. Nor, in the case which is suggested as an alternative, of his having forgotten altogether the circumstance of the existence of that necessary ingredient in his title, would the case be at all different from that of any vendor who believed, at any period of the existence of his title, that there was some difficulty existing in it, but forgot that circumstance at the time of his making his bargain; in which case the vendor with a good conscience might be brought within the rule in *Flureau* v. *Thornhill* (1).

I entirely agree with the comments which my noble and learned friend has made upon the case of *Hopkins* v. *Grazebrook* (2). I think it would be impossible to say, regard being had to the principles upon which the Courts have proceeded since the rule in *Flureau* v. *Thornhill* (1) was laid down, that *Hopkins* v. *Grazebrook* (2) can substantially be distinguished from that case; because in *Hopkins* v. *Grazebrook* (2) the vendor had made a bargain with another person for the purchase of a property which he had every reason to suppose would be conveyed to him within a certain reasonable time. Having made that bargain he made another contract for the sale of the same property. He was just in the same position as any other vendor having an equitable title transferred to him, who might under those circumstances choose to sell it himself, as the Defendant chose in that case to make a sale of that property. The circumstance of his not being in possession, when you look at the complicated law which governs real estate in this country, is not a circumstance which in itself ought at all to lead the Court to say that he must have known that he could not complete the title. In a vast number of instances, from a variety of circumstances, the actual vendor may not be immediately in possession, although he may have a right to obtain that possession in a reasonable time, and to compel (as the vendor had a right to do in *Engel* v. *Fitch* (3)) those who are in possession to hand over

(1) 2 W. Bl. 1078.
(2) 6 B. & C. 31.
(3) Law Rep. 3 Q. B. 314; in error, 4 Ibid. 659.

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that possession to him. I do not think, therefore, that there is any sound distinction between the case of *Hopkins* v. *Grazebrook* (1) and that class of authorities which are governed by *Flureau* v. *Thornhill* (2).

My Lords, under these circumstances, I have no hesitation in coming to the conclusion that the decision of the Court now appealed from was right and ought to be affirmed.

Judgment of the Courts below affirmed.

Lords' Journals, 22nd June, 1874.

Attorneys for Plaintiffs in Error: Messrs. *Helder & Roberts.*
Attorneys for Defendants in Error: Messrs. *Thomas & Hollams.*

MARIA PATRICIA BRIDGES . . . . . { PLAINTIFF IN ERROR; — 1873 *July* 4.

AND

THE DIRECTORS, &c., OF THE NORTH LONDON RAILWAY COMPANY . . . { DEFENDANTS IN ERROR. — 1874 *May* 15; *June* 22.

Railway—Negligence—Evidence for Jury—Nonsuit.

B. was in the last carriage of a railway train. Before reaching the station at which he was to alight the train had to pass through a tunnel. In that tunnel there was, first, a heap of hard rubbish lying by the side of the rails irregular in form and height, then a short sloping piece of ground, then a piece of flat platform, like the main platform, but narrower, and within the tunnel. Beyond these was the main platform itself. The train only partially went up to the main platform, leaving the last two carriages within the tunnel, which had no light within it, and on the occasion in question was filled with steam. The last carriage but one came opposite the narrow platform, the last carriage was opposite the hard rubbish. A passenger in the last carriage but one (who was called as a witness at the trial) heard the name of the station called out in the usual way and got out upon the narrow platform. He then heard a groaning, and proceeding farther back into the tunnel found *B.* lying on the rubbish with his legs between the wheels of the last carriage, but neither of them had touched him. *B.'s* leg was broken, and he had received other injuries, from the

(1) 6 B. & C. 31. (2) 2 W. Bl. 1078.

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effects of all which he died. The witness heard the warning, "Keep your seats," and shortly afterwards the train moved on.

On these facts the learned Judge at the trial held that there was no evidence of negligence to go to the jury, and he directed a nonsuit. Owing to a strong expression of opinion by the jurymen he took their finding (on the assumption that there ought to be a verdict for the Plaintiff) as to the amount of damages. The nonsuit was then entered, with leave to move to enter the verdict for the damages assessed :—

Held, that the ruling at Nisi Prius could not be sustained; that the case ought not to have been withdrawn from the consideration of the jury, for that the evidence furnished matter on which it was necessary to take the opinion of a jury.

Quære, whether calling out the name of a station is an invitation to the passengers, going to that station, to alight there (1).

ACTION for damages for negligence in causing the death of the Plaintiff's husband. Plea not guilty.

The cause was heard before Mr. Justice *Blackburn* at the *Middlesex* Sittings after Michaelmas Term, 1869.

Mr. *Bridges*, who resided at *Highbury*, had been a season ticket-holder on this railway for some time, going daily between that place and *Broad Street*, the City terminus of the railway. He was fifty-two years of age, and very near sighted. On the 20th of January, 1869, he left *Broad Street* at 6.40 P.M. He was in the last passenger carriage of the train, the very last carriage being the guard's compartment. The train arrived at *Highbury* at a few minutes before 7 o'clock.

The tunnel was filled with steam, the night being damp. The station at *Highbury* appeared, from the statement in the case prepared for the Exchequer Chamber, to be thus formed: Approaching the station from *London* there is a tunnel about 150 feet in length; there is a slope, on which was lying a heap of hard rubbish, and then a platform, which is, in fact, a continuation of the station platform, but is narrower, and is within the tunnel. After getting through the tunnel there is the proper station platform. The station is lighted. There is a lamp at the station end of the tunnel, but none within the tunnel itself. On this occasion the train only partially came up to the station platform, the last two carriages being within the tunnel. The last but one stopped

(1) See *Weller* v. *The London, Brighton, &c, Railway Company*, Law Rep. 9 C. P. 126.

opposite the narrow end of the platform; the last, in which Mr. *Bridges* was riding, was opposite the heap of hard rubbish. A passenger (afterwards called as a witness at the trial), who was in the last carriage but one, heard the name of the station called out in the usual way and got out; he alighted on the narrow platform; "after he got out he heard the warning, 'Keep your seats,' after which the train moved on to the station. The witness hearing a groan, proceeded farther back into the tunnel, and found the deceased lying with his legs across the rails, between the wheels of the carriage, and his body on the rubbish. The wheels had not touched his legs or body (1). He was lying about ten feet from the end of the slope, and farther within the tunnel." His leg was broken, and he had received mortal internal injuries from the fall.

Mr. Justice *Blackburn* was of opinion that there was no evidence of negligence on the part of the Defendants, and directed a nonsuit; but the jury expressing a strong opinion to the contrary, a verdict was taken for the Plaintiff, the jury assessing the damages at £1200. The nonsuit was then entered, but leave was reserved to move to enter the verdict for the Plaintiff for the damages thus contingently assessed.

A rule was accordingly moved for, and, after argument in the Court of Queen's Bench, was refused. On appeal to the Exchequer Chamber the facts were stated in a Case, power being reserved to the Judges to draw inferences of fact. The case was heard, and the judgment of the Court below was affirmed by four Judges to three (2). This appeal was then brought.

The Judges were summoned, and Lord Chief Baron *Kelly*, Mr. Baron *Martin* (3), Mr. Justice *Keating*, Mr. Justice *Brett*, Mr. Justice *Denman*, and Mr. Baron *Pollock* attended.

(1) This was the statement in the Case, which is here much confused, for the train is represented to have "moved on," as if it had done so before the groan was heard, and yet the deceased is represented to have been found with his legs between the wheels, neither of which had touched him. The order in which the facts occurred was most probably this, the witness found the deceased, moved his legs from between the wheels, then heard the warning, and then the train moved on.

(2) Law Rep. 6 Q. B. 377.

(3) Mr. Baron *Martin* heard the argument, but retired from the Bench before the Judges' opinions were delivered.

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Mr. *Henry James*, Q.C., and Mr. *Kemp* (Mr. *Snagge* was with them), for the Plaintiff in Error :—

The question here is, whether there was evidence of negligence on the part of the Defendants, which ought to have been left to the jury. There is no question raised as to whether the deceased was contributing to his own injury. The sole question is, was there evidence of negligence on the part of the Defendants. There was plain evidence of it. In the first place the train stopped while a portion of it was still in the tunnel; that part of the tunnel was unlighted; and it was not a fit and safe place for passengers to alight. Nevertheless they believed that they were required to alight there, for the name of the station was called; and calling out the name of the station is an invitation, and, indeed, something more, to all passengers who have taken tickets for that station, to alight there. If they do not so alight, they will be carried on to the next station, and will there be compelled by the company to pay additional fare, and a return fare for the back journey. The call, therefore, is an authoritative request to alight, and is universally so considered. The penalty for neglecting it is not merely the passenger's own loss of time and his own inconvenience, but the liability to pay additional fares, which liability may be enforced by legal compulsion. The passenger holds a contract by which on his part he binds himself to get out of the train at a particular station, and his not doing so is not merely a breach of contract, it may be treated as an offence. The calling out the name of the station is, therefore, an authoritative demand upon the passenger to perform his contract, and if a passenger was proceeded against for travelling without a ticket, the fact that the name of the station was called out would be treated, against him, as complete evidence of notice. In *Foy* v. *The Brighton Railway Company* (1) there was not room for the whole train to stop at the platform; the passengers were required to alight; a lady did alight in a dangerous place, and though she had jumped down without waiting to be assisted, the jury having found that the company had been guilty of negligence in not providing reasonable means of alighting, and having given her damages, the Court refused to disturb the verdict.

(1) 18 C. B. (N.S.) 225.

In *Siner* v. *The Great Western Railway Company* (1), there was no invitation to alight, and that in substance constituted the difference which excused the company. The same excuse could not apply in *Cockle* v. *The South Eastern Railway Company* (2). In the course of the judgment in that case (3), delivered by Lord Chief Justice *Cockburn*, *Praeger* v. *The Bristol and Exeter Railway Company* (4) is referred to, and there his Lordship, making full allowance for a train not being able to be wholly brought up to the platform, declared that if the passenger got out on the invitation of an official, the means of safety ought to be provided for him. And *Siner* v. *The Great Western Railway Company* (1) was distinguished, and it was declared that opening the door by the guard was an invitation to alight. The case of *Gee* v. *The Metropolitan Railway Company* (5) is decisive to shew that in not taking care to have the doors of carriages properly fastened, so as to be secure, a company may be guilty of negligence, and be held liable in damages; and the case of *Adams* v. *The Lancashire and Yorkshire Railway Company* (6), which seemed to have followed a different rule (though there the subject of contributory negligence was introduced, and really decided the case), was questioned. And *Gee* v. *The Metropolitan Railway Company* (5) expressly recognised the rule, that where there is evidence of negligence on the part of the Defendants, though there may also be evidence of contributory negligence on the part of the Plaintiff, that must always be a question for the jury, and it is not a case for a nonsuit.

Now here there could be no doubt that in fact there had been negligence on the part of the company's servants. They brought the train to a stand at an improper place. They had called out the name of the station, which was a plain and direct intimation that that was the place at which the passengers going to that station ought to alight; and when there had been time enough for this erroneous intimation to produce its full effect, they shewed that they felt it was wrong by telling the passengers to keep their seats. This itself was evidence of the previous negligence.

(1) Law Rep. 4 Ex. 117.
(2) Law Rep. 7 C. P. 321.
(3) Ibid. 323.
(4) 24 L. T. (N.S.) 105; see Law Rep. 7 C. P. 323-4. 8 B. & S. 402 n.
(5) Law Rep. 8 Q. B. 161; and see p. 169.
(6) Law Rep. 4 C. P. 739.

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Sir *J. Karslake*, Q.C., and Mr. *Aspinall*, Q.C. (Mr. *A. G. Shiell* was with them), for the Defendants in Error:—

The judgment here must be affirmed unless it clearly appears that the deceased man was killed by the negligence of the company's servants. By the allegations in the declaration, that is the case which the Plaintiff undertakes to make out. The evidence must shew that distinctly, and must shew it to have occurred independently of any other cause. That is well put by Mr. Justice *Brett* in *Gee* v. *The Metropolitan Railway Company* (1). He says that the Plaintiff must shew "that the negligence of the Defendants was the cause of the Plaintiff's injury; and farther, that it was the sole cause, in a certain sense . . . . The meaning of the phrase, 'that it must be solely caused by the Defendants,' is, solely caused as between them and the Plaintiff, that is to say, that it is caused by the negligence of the Defendants without being contributed to by any negligence or want of care on the part of the Plaintiff." In *Tooney* v. *The London and Brighton Railway Company* (2) a person inquired for one room, and by mistake went to another, where he fell down some steps and was injured. It was there said in judgment that the company had not been guilty of negligence, for that there was no evidence that the steps were dangerous, and Mr. Justice *Willes* remarked, "It is impossible for any one so to dispose of his property that a man may not by accident or negligence injure himself upon it." It was so here; the rubbish was not shewn to be actually dangerous in itself, any more than were the stairs in that case; and without such evidence being given, the Plaintiff could not recover. So in *Crafter* v. *The Metropolitan Railway Company* (3), where the Plaintiff fell down a staircase, the edges of the stairs of which were topped with brass, which by use had become smooth and slippery, and the witnesses described the staircase as unsafe from that cause, and were of opinion that there should be a hand-rail by the side, the Court thought that there was no evidence of negligence to go to the jury, and a nonsuit was entered. In *Adams* v. *The Lancashire and Yorkshire Railway Company* (4), it was held that the action could

(1) Law Rep. 8 Q. B. 174.
(2) 3 C. B. (N.S.) 149; 27 L. J. (C.P.) 39.
(3) Law Rep. 1 C. P. 300.
(4) Law Rep. 4 C. P. 739.

not be maintained on account of the absence of evidence of negligence. There, a door of the carriage being insecurely fastened, flew open several times, and was shut by the passenger, who in his last effort to close it, injured himself. The fact that it would not continue shut was held not alone to constitute proof of negligence on the part of the company. The case of *Foy* v. *The Brighton Railway Company* (1) does not apply to the present, for there the train was drawn up, and drawn up finally, at a wrong place, and there was an express invitation to the passengers to alight. There was no such invitation here—calling out the name of the station did not amount to that, nor had the train finally stopped when the deceased, without cause or invitation, attempted to get out of it. In *Siner* v. *The Great Western Railway Company* (2) the train had finally stopped, but there, as the lady had got out of her own accord, and had received an injury in doing so, the Court of Exchequer Chamber held that there was no evidence of negligence to affect the company, although there was no doubt that the spot where the Plaintiffs' carriage stopped was not the proper one—that carriage having overshot the platform, which was too short for the length of that particular train. In *Cockle* v. *The South Eastern Railway Company* (3) the platform was long enough for the train, but the last carriage of the train did not reach the platform, and the stoppage was a final stoppage; no warning was given that the carriage was not close to the platform, or that care would be necessary in alighting; there was no light at that place, nor any care taken to enable the passengers in the last carriages to alight; and all these circumstances taken together were held to amount to evidence of negligence. Here, the train had not come to a final standstill, and the other circumstances were different, and that case, therefore, could not be held to govern the present. In *Praeger* v. *The Great Western Railway Company* (4), the guard opened the door of the carriage, which the Court construed as "an invitation to alight and to alight with safety." There was nothing of that kind here and therefore that case was inapplicable. But even there it was expressly stated that the passengers were bound

(1) 18 C. B. (N.S.) 225.
(2) Law Rep. 4 Ex. 117.
(3) Law Rep. 7 Q. P. 321.
(4) 24 L. T. 105; see Law Rep. 7 C. P. 323-4. 20 L.T.Q.B. 402 n. (y)

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to use reasonable care. It was impossible to say that reasonable care had been used here, for the mischief must have been occasioned by the mode of getting out, since it was evident that the wheels of the carriage had not passed over the deceased, nor inflicted any injury on his person. [LORD COLONSAY:—In what position was the man found?] The case states that he was "lying with his legs across the rails, between the wheels of the carriage, and his body on the rubbish. The wheels had not touched his legs or body." [LORD COLONSAY:—Does not that shew that the train had at that time come to a standstill?] The injury happened from his attempt to alight, and was not occasioned by the train.

All these authorities, however the circumstances of each case differed from those of any other, really established the principle that the passenger himself must use reasonable care, and could not make the company liable for an injury caused by his want of it, and he must shew that the injury was the result of actual negligence on the part of the company. Here there was no proof of the kind; there was no invitation to alight, there was no act of the company's servants that led the deceased into danger. On the contrary, the warning to "Keep your seats," shewed that care had been taken, and distinctly proved that the train had not come to a final standstill, and consequently that there was no necessity, and, if no necessity, no excuse, for the passengers attempting to alight. The deceased ought to have waited till the train drew up at the proper platform, when he might have alighted with perfect safety.

There being no evidence on which the jury could reasonably find, in point of fact, that there had been negligence, there was no necessity for leaving the case to the jury, but the Judge rightly took on himself to say that no case had been made out for the Plaintiff and that there must be a nonsuit. That principle was distinctly laid down in *Ryder* v. *Wombwell* (1).

LORD CAIRNS, who presided in the absence of THE LORD CHANCELLOR, proposed that the following question should be put to the Judges:—

Whether in the facts stated in the special case, and having

(1) Law Rep. 4 Ex. 32.

regard to the liberty thereby given to the Court to draw any inference or find any facts from the facts therein stated, there was evidence of negligence on the part of the Respondents which ought to have been left to the jury?

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The LORD CHIEF BARON requested time for the Judges to answer the question.

MR. BARON POLLOCK:—

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My answer to your Lordships' question is in the affirmative.

[The learned Baron, having stated the facts of the case, said:—]

The general rule which prescribes the duty of the Judge presiding at Nisi Prius, when the question is raised whether, at the close of the Plaintiff's case, there is evidence which ought to be left to a jury, is laid down in the judgment of the Court of Exchequer Chamber in *Ryder* v. *Wombwell* (1), where the question being whether articles supplied by the Plaintiff to the Defendant, who was an infant, were "necessaries," the Court said: "The first question is, whether there was any evidence to go to the jury that either of the above articles was of that description? Such a question is one of mixed law and fact; in so far as it is a question of fact it must be determined by a jury, subject no doubt to the control of the Court, who may set aside the verdict and submit the question to the decision of another jury; but there is in every case, not merely in those arising on a plea of infancy, a preliminary question which is one of law, namely, whether there is any evidence on which the jury could properly find the question for the party on whom the onus of proof lies. If there is not, the Judge ought to withdraw the question from the jury and direct a nonsuit if the onus is on the Plaintiff, or direct a verdict for the Plaintiff if the onus is on the Defendant."

This is a clear exposition of the rule, and it has been generally acquiesced in and acted upon, and it follows from it that although the question of negligence or no negligence is usually one of pure fact, and therefore for the jury, it is the duty of the Judge to keep in view a distinct legal definition of negligence as applicable to the particular case; and if the facts proved by the Plaintiff do

(1) Law Rep. 4 Ex. 32, 38.

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not, whatever view can be reasonably taken of them, or inference drawn from them by the jurors, present an hypothesis which comes within that legal definition, then to withdraw them from their consideration.

I commence, therefore, by considering what was the duty of the Defendants towards their passengers upon the occasion in question, the non-observance of which would constitute negligence? It appears to me that their duty may be stated generally by saying that they were bound to provide a proper place, and proper means for alighting at the *Highbury Station*, and this involves not merely the actual formation of the platform, and the length and position of the train, but also the time at which the passengers could, with reference to the usual course of the journey and the conduct of the company's servants, reasonably suppose that the proper time for alighting had arrived.

In the present case the facts given in evidence by the Plaintiff fall short of those which actually occurred, and this seems to be, as in many similar cases it is, essential to the character of the event. Because although the evidence which relates to the stopping of the train, whilst the last two of the passenger carriages were within the tunnel, and to the calling out by the porters first of "*Highbury*" and then "Keep your seats," must, being uncontradicted, be accepted as fact; the precise time when, and the manner in which the deceased attempted to alight is left to be inferred.

The jurymen, had the facts been left to them, might have inferred that before the proper time for the deceased to alight had arrived, the warning "Keep your seats" had been given, and the train had moved on towards the station, and if this had been so, the place for alighting provided by the company was a proper one, having reference to the time at which the deceased had a right to claim such provision,—or inverting the proposition, he had no right to alight at an earlier period, and therefore when he did so, he by his own imprudence contributed to the injuries he received. But it must be remembered that a passenger who was called as a witness was in the last carriage but one, and he heard "*Highbury*" called, and got out before the warning "Keep your seats" was given, and alighted safely; because although within the tunnel his carriage was opposite to the narrow platform.

Now taking this fact, together with the other evidence given by the Plaintiff as it stood, without contradiction or explanation by the Defendants, the jury might fairly have found that, looking to the ordinary requirements of the passenger traffic, the length of the platform was insufficient, or if in itself sufficient, that there was negligence on the part of those in charge of the train, in stopping it before it was wholly alongside the platform, or on the part of the porters in calling out "*Highbury*" before the train was wholly alongside. The Defendants might have shewn that there were exceptional circumstances which rebutted this inference, as that the break power was diminished by some accident over which they had no control, that the rails were by some unforeseen event unusually slippery, or that a dense fog prevented the porters from seeing the exact position of the train, but all this is beside the present question.

Then it is said that assuming there was some evidence of negligence on the part of the Defendants, the Plaintiff must have acted so rashly or carelessly as to disentitle him to recover. I say *must*, because that he may have done so would not be sufficient to support the Defendants' contention. It appears to me that the jurors were entitled to assume that *primâ facie* the deceased would conduct himself with ordinary prudence and discretion, and that there was evidence from which they might fairly have found that the deceased, having heard "*Highbury*" called out, and finding the train had stopped, got out of the carriage before it moved out of the tunnel, and whilst it was opposite the hard rubbish, supposing that he would alight on the platform. Had he known the rubbish was there instead of the platform, to jump out on to it with such a fall as would break his leg, and occasion mortal internal injuries, would indeed have been negligent and rash in the extreme. But it was two hours after sunset, there was no light within the tunnel, and the deceased was near sighted, and he might well have supposed he would step on to the platform, as did the passenger in the next carriage, with impunity.

The Plaintiff no doubt is bound to make out her case, and cannot by a bare suggestion challenge its rebuttal, and if what I have stated was all mere speculation, it ought not to have gone to

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the jury, but if it was an inference which could be fairly drawn from the facts proved in the same manner as things unseen or unproved—which in the eye of the law are the same—are constantly inferred and found as facts by a jury, then the evidence should have been submitted to the jury, together with any which the Defendants chose to adduce, and which might have exculpated or farther inculpated them according as their witnesses knew more of the occurrence and confirmed or displaced the evidence for the Plaintiff.

This is not merely the view which presents itself to my mind upon the consideration of the facts themselves, but the more I have studied the judgments of those learned Judges from whose opinion I have the misfortune to differ, the more I have been led to the conclusion that it cannot correctly be affirmed that under no circumstances could the jury have reasonably drawn the two inferences that there was negligence of the company's servants and no contributory negligence on the part of the deceased.

In this view of the case it is unnecessary for me to consider piecemeal the conduct of the Defendants' servants, or the proper effect to be attributed to the calling out by the porter of the name of the station. Its intention as an invitation to alight must obviously be often conditional, and I concur in the view that is taken of it by the late Mr. Justice *Willes* in his judgment in this case in the Court of Exchequer Chamber, where he says: "It is an announcement by the railway officers that the train is approaching or has arrived at the platform, and that the passengers may get out when the train stops at the platform, or, under circumstances, induced and caused by the company, in which the man reasonably supposes he is getting out at the place where the company intended him to alight."

In the course of the argument at the Bar several cases were cited in which actions had been brought by railway passengers against the companies by which they were carried to recover compensation for injuries received in consequence of alleged omission to supply proper and safe means for alighting; but as these cases varied in their circumstances, and none of them was identical with the present, I do not feel that farther allusion to them would assist your Lordships, though I ought to add that I can find no

decision which is contrary in principle to the view which I respectfully submit.

MR. JUSTICE DENMAN:—

My Lords, in answer to the question put by your Lordships, I am of opinion that in the facts stated in the special case, and having regard to the liberty thereby given to the Court to draw any inference or find any facts from the facts therein stated, there was evidence of negligence on the part of the Respondents which ought to have been left to the jury.

The action was brought by the Plaintiff as executrix of her deceased husband for damages occasioned by his loss. The declaration stated that the deceased was a passenger on the Defendants' line, to be carried to a station called *Highbury Station;* "that the Defendants did not use due and proper care in and about the carrying of him as such passenger, and so negligently conducted themselves that the deceased whilst getting out of and descending from a carriage, was cast and thrown, and fell and came down to and upon the ground, and was so injured that he died."

This declaration is certainly somewhat vague; but no objection on that account appears to be open to the Defendants, inasmuch as the leave given at the trial was to enter the verdict for a certain sum which the jury had assessed if the Court should be of opinion that there was *any* evidence of negligence on the part of the Defendants which could properly be left to the jury.

By this reservation I understand that the verdict was to be entered for the Plaintiff for the sum assessed if the Court should be of opinion that the accident which caused the death of the Plaintiff's husband was, or might reasonably have been, found to have been due to any proved fact or set of facts which might be reasonably considered by a jury to constitute negligence on the part of the Defendants or their servants, in the course of the conveyance of the deceased to, and his safe deposit at, *Highbury Station,* or at least in the latter respect.

Plans of the station at which the Plaintiff was to have alighted, and of the scene of the accident, were used at the trial, and were annexed to, and form part of, the special case. The Court was

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to be at liberty to draw any inferences of fact from these plans, as well as from the facts stated.

The jurors at the trial, as appears from the case, after hearing the Plaintiff's evidence, expressed a strong opinion in favour of the Plaintiff. The learned Judge who tried the cause nonsuited the Plaintiff; but owing to the opinion thus expressed, took their opinion as to the amount of damages, and gave her leave to move in the terms above mentioned.

The material facts of the case, as it appears to me, may be fairly stated as follows:—I do not use the exact language of the special case, but state what appears to me to be the fair result, drawing only such inferences as the understanding between the parties empowers the Court to draw.

The deceased, a man of fifty-two years of age, and very short-sighted, travelled on the night in question (the 20th of January), in about the centre compartment of a second-class carriage, the hindmost of a train of five or six carriages. It was 7 P.M., and therefore dark. His short-sightedness would on the one hand render it incumbent upon him to take more care than would be needed by a sharp-sighted person, because he could not trust to appearances so confidently. On the other hand, it would go to account for a mistake on his part, which might not have been made by a man of good vision, as to the actual condition of the place upon which he was alighting.

The deceased lived close to the *Highbury Station*, and had for a considerable time been a daily traveller on the line to and from that station. He would therefore well know the proper place at which to alight, as well as the usual habits of the trains. This, on the one hand, would give him a better opportunity than a stranger of avoiding danger by avoiding any place of alighting which he did not know to be safe, as distinguished from those places which he knew to be safe; on the other hand, this very familiarity with the station might have a tendency to mislead him with a false security if he had frequently on other occasions alighted or known others to alight at the same place, and found it safe and practicable, and if on the particular occasion an unexpected and dangerous obstruction had been placed at that spot.

Approaching the station there is a tunnel, as described in the

Case and as shewn upon the plan. On the night in question the train, from some unexplained cause, but which the Defendants might have explained if the nonsuit had not taken place, stopped while the last two carriages were in the tunnel. The platform ran for a short distance under the tunnel at the same level as at the station proper, it then gradually sloped down to the level of the line. The front compartment of the carriage in which the deceased sat was opposite the slope. On the night in question there lay a quantity of hard rubbish of the average height of 1 ft. 1 in., and of the average width of 2 feet, which extended from the foot of the slope for about 50 feet farther into the tunnel, so that any person getting out of that compartment in which the Plaintiff was, would, if he put his foot down at that place believing the ground to be in its normal state and at its usual level, have probably come in contact with the heap of rubbish, and fallen in consequence. It was, I think, also quite possible on the night in question that a person even with good sight might have mistaken the heap in question either for that part of the platform which lay within the tunnel, or for the upper part of the slope above mentioned. There was no lamp in the tunnel, but there was one at the mouth of the tunnel, 27 ft. 11 in. from the spot where the deceased alighted. Owing to the dampness of the night the tunnel was full of steam. The surface of the heap described above was irregular, so that if a passenger in alighting once stumbled over it he might in struggling to save himself, have fallen in such a manner as to cause a serious accident. There was a cry of "*Highbury*" as the train was stopping or after it stopped, and immediately afterwards a cry of "Keep your seats." The train moved on again after stopping, but not, as I infer, until after the accident had happened. The deceased was found 27 ft. 11 in. from the lamp above mentioned, and about 10 feet from the foot of the slope and farther within the tunnel.

It is stated in the Case, and must be taken as a fact, that the deceased broke his leg in attempting to alight, and received mortal injuries by his fall; from which I infer that either by alighting on the rubbish before he expected to touch the ground he broke his leg from the sudden resistance he unexpectedly met with, or that he fell in consequence of so alighting and broke his leg by falling on the irregular hard surface of the heap of rubbish, whether from

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a first or second or subsequent fall, or blow of the leg against the rubbish. It is expressly found that the wheels had not touched his legs or body.

Upon the above statement of the facts of the case, as I understand them, having drawn all such inferences as seem to me to be the natural and proper inferences to be drawn, I have felt very considerable doubt, on one ground only, whether this was a case in which the evidence ought to have been left to the jury. The ground I refer to is, whether taking everything to have been proved which I have stated, and all the inferences I have drawn to be correct, the cause of the accident was not left in so much doubt and obscurity that it might properly be laid down that the Plaintiff, on whom undoubtedly the burthen of proof lay, had failed to prove that the death of the Plaintiff resulted from negligence of the company, and had only made out a case of death by an accident consistent with other possible and even probable causes. The judgment of *Channell*, B., in the Court below, puts this view of the case as forcibly as it can be put; but on full consideration of the whole of the case, the evidence given, the inferences fairly to be drawn, the plans put in at the trial, and the measurements given upon them, I have come to the conclusion that the matter is not left in such a state, as regards proof, as to justify a Judge or Court in withdrawing the case from the consideration of a jury.

Before it could be decided whether the facts proved constituted reasonable evidence of negligence, a great many separate facts had to be considered, and some inferences must inevitably be drawn. Probabilities were to be taken into account, plans were to be examined. If a view by the jury had taken place (which does not appear) such view would have been of considerable importance in enabling the viewers to appreciate the evidence, and to report what they might have observed either to the Judge or their fellow jurors, and such report might reasonably influence the mind of the Judge in deciding whether there was a case to go to the jury or not; but it is impossible to mention all these matters without feeling that they are in their nature questions more for the consideration of a jury than of a Judge or Court. This observation becomes still more cogent if it be admitted, as I think it must be admitted, that whoever decided the question of whether there was evidence to go

to the jury, would be entitled, if not bound, to take into account his own experience of railway travelling, usual construction of stations and platforms, usual mode of stopping, alighting, giving warning by voice or lights, and other matters relevant to the present case.

The question of negligence is one peculiarly within the province of a jury, and I apprehend that it is a question with the decision of which the Judge should not interfere, unless he is very certain that the question has been reduced to a mere definition of what is the Defendant's legal duty in respect of the matters wherein negligence is alleged, upon a well ascertained and indisputable state of facts. The legal duty itself often depends upon the question what would it be reasonable for a Plaintiff or a Defendant to do under a complicated state of facts; and this also is a question not of law but of fact, and as such peculiarly within the province of a jury.

After fully considering the evidence in this case, I am strongly of opinion that there was evidence of negligence which ought to have been left to the jury—evidence upon which the jury might not unreasonably have found such negligence to have caused the death of the Plaintiff's husband—evidence moreover (in case your Lordships should consider that question open upon the reservation in this case) upon which the jury might have reasonably found that this accident was *wholly* due to the Defendants' negligence, and to no other cause whatever.

I do not think it necessary for the decision of the question put by your Lordships that the Court should be able to say exactly how the accident happened; but I may be permitted to say that judging from the statements in the Case, and from the plans, and from such inferences as I draw from both, I feel satisfied that the accident happened through negligence of the Defendants or their servants in not having some person, guard, porter, policeman, or other person, either by voice or light, to prevent passengers from running the risk of falling over the heap of hard rubbish which lay along the side of the hinder carriage of the train on the night in question.

It is, however, unnecessary to decide whether a verdict for the Plaintiff on this ground would have been one in which I, if I had been on the jury, should have concurred. It is enough to say that

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in my judgment there was evidence upon which a jury might reasonably find that this accident happened wholly through the negligence of the Defendants in not providing for the safe alighting of passengers at that place, on that night, and under these circumstances.

The argument and judgments in the Court below turned mainly on the meaning to be attributed to the calling out "*Highbury*" on the arrival of the train. I do not feel myself entitled to lay down any rule to the effect that such calling out did or did not amount to an invitation to alight. I think, however, that the jurors were entitled to consider that fact as one of importance in the case, especially when coupled with the other fact found, that the words "Keep your seats" were called out shortly afterwards, though not, as I infer, until after the accident had happened. I think the jurymen were entitled to put their own construction on these facts in connection with the other circumstances of the case.

On the whole I think this case was one which ought to have been left to the jury; and though in most cases I should feel that the difference which exists between my own opinion and that of the very learned Judges who constituted the majority in the Court below, was a strong ground for causing me to doubt the correctness of my own view, yet I must own that in this case the great difference of opinion which appears in the judgments below increases my confidence in thinking that the question was one properly for the jury and not for the Judge, and the fact that cases of the class to which the present belongs so constantly divide the Judges in opinion, and often lead to decisions which it is almost impossible to reconcile with each other, seems to me to afford an additional reason for thinking that in this case the learned Judge by non-suiting the Plaintiff departed from the old maxim of the English law, "*Ad quæstionem facti non respondent Judices.*"

My Lords, my Brother *Keating* concurs in this opinion.

MR. JUSTICE BRETT:—

My Lords, before determining whether there is or is not evidence fit to be left to a jury in support of questions, one must know what the questions are which are to be so left. It seems impossible to answer satisfactorily the question whether there was or was not

evidence of negligence which ought to have been left to the jury, without first determining the form in which the question of negligence, if left, should be judicially stated to a jury. It is farther necessary, as it seems to me, to consider the formula which should be applied to the facts in evidence, in order to see whether they ought or ought not to be left to the jury. And farther, how much of the dealing with facts is within the province of the Judge, and how much is exclusively within the province of the jury. These are the questions which have been differently treated in form by different Judges, and which might be rendered more easy of solution as they arise, if definite propositions with regard to them were enunciated by a paramount authority. They are all questions of law; that is to say, of principle. It seems to me that nothing can be a principle or rule of law, that is to say, there is nothing which a Court or Judge can have to rule as a question of law, which cannot be brought within some general rule or principle which may be predicated.

The cases to which your Lordships' question refers are cases in which a passenger by railway brings an action against the railway company to recover damages for injuries alleged to have been incurred by reason of the negligence of the Defendants or their servants. What is the direction in point of law which ought to be given to the jury at the trial? It is this: that the Plaintiff founds his claim upon an allegation that he has suffered injury by reason of the negligence of the Defendants or their servants. If he has so suffered from such a cause his claim is well founded, because it is an implied part of the contract of carriage that the Defendants and their servants will use reasonable care and skill in the conveyance of the passenger to his agreed destination. And if the Defendants or their servants have been negligent or wanting in reasonable skill in the conveyance, and the passenger has been injured, there has been a breach of contract for which the Defendants are liable, and for which the passenger is entitled to compensation by way of damages.

The proposition therefore which the Plaintiff undertakes to substantiate is that he has suffered injury by reason of the negligence of the Defendants or their servants. In order to make this out the Plaintiff must prove that the Defendants or their servants,

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or both, have been guilty of negligence, that such negligence caused him injury, that as between him and the Defendants it was the sole cause of the injury; that is to say, that he did not by any negligence of his own contribute to the injury he has suffered. This direction, however, is not yet sufficient. It requires to be amplified by a legal definition of what amounts to negligence. That definition is, that negligence consists in the doing of some act which a person of ordinary care and skill would not do under the circumstances, or in the omitting to do some act which a person of ordinary care and skill would do under the circumstances. The final and full and strict direction to a jury therefore in such cases is contained in the following questions: Have the Defendants or their servants done anything in the conveyance of the Plaintiff to his destination which persons of ordinary care and skill under the circumstances would not have done, or have they or their servants omitted to do anything which persons of ordinary care and skill under the circumstances would have done? Have they or their servants by such act of commission or omission caused injury to the Plaintiff? Did the Plaintiff do anything which a person of ordinary care and skill would not have done under the circumstances, or omit to do anything which a person of ordinary care and skill would have done under the circumstances, and thereby contribute to the accident? The Plaintiff can only recover if he satisfies the jury by evidence that the Defendants or their servants were guilty of negligence as described, and that he has been injured thereby, and that he has not been guilty of negligence as described contributing to the accident.

2 C P D 373.

Such is the direction to the jury, but before giving this direction it is the duty of the Judge to determine whether there is evidence fit to be left to the jury on each of the propositions which it is necessary that the Plaintiff should establish. This being a duty cast exclusively on the Judge is a question to be decided according to some proposition or rule of law. What is that proposition or rule of law which the Judge is bound to apply to the evidence in order to determine this question of law? It cannot merely be, is there evidence? That has no meaning without a farther proposition defining when it is to be considered in point of law that there is evidence. Without a proposition or rule

which can be enunciated or predicated, there is no rule of law; a rule of law can always be predicated in terms. The proposition seems to me to be this: are there facts in evidence which if unanswered would justify men of ordinary reason and fairness in affirming the question which the Plaintiff is bound to maintain? It may be said that this is so indefinite as to amount to no rule, that it leaves the Judge after all to say whether in his individual opinion the facts in evidence would prove the proposition; but I cannot think so. It is surely possible to admit that reasonable and fair men might come to a conclusion which oneself would not arrive at. And Judges may be able reasonably to say frequently, that although they would not upon the facts have come to the same conclusion to which the jury has come, yet they or he cannot say but that reasonable and fair men might agree with the conclusion of the jury; or, in other words, that, although they would not have arrived at the same conclusion, it is not contrary to reason to have arrived at it.

The Judge must, therefore, before directing the jury in the terms above set forth, first determine the following questions: Are there facts in evidence upon which, if unanswered, men of ordinary reason and fairness might fairly say that the Plaintiff had been injured by some act of commission or omission by the Defendants or their servants? Are there facts in evidence upon which, if unanswered, men of ordinary reason and fairness might fairly say that any such act of commission or omission was such as a person of reasonable care and skill under the same circumstances would have done or omitted to do? Are there facts in evidence upon which, if unanswered, men of ordinary reason and fairness might fairly say that the Plaintiff had not, in a manner contributing to the accident, done anything or omitted to do anything which a person of ordinary care and skill under the same circumstances would not have done or would have done?

If the Judge, not deciding the final issues according to his own individual view, but determining according to the propositions last laid down, holds that there is no evidence fit to be left to the jury on some one of the cardinal questions before stated, he must direct the jury as matter of law that there is no case in favour of the Plaintiff, or he must nonsuit the Plaintiff. If he holds that

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there is evidence on each of the cardinal questions, he must leave the case to the jury according to the direction in point of law before laid down in this opinion. When the Judge has so directed the jury as to the law he has finished all which it is legal for him exclusively to determine in the case. He ought then, though I do not think there is any legal absolute obligation on him to do so, to point out to the jurors the bearing of the facts in evidence upon each of the questions which they must determine, and which of the facts are in his judgment in dispute, and that there are not only the facts directly deposed to which are to be considered, but facts or propositions of fact which are to be inferred from the facts directly deposed to, and finally that it is for them to say whether the facts directly in evidence and adopted by them, and the facts and propositions of fact inferred by them, do or do not amount in their judgment to proof of the propositions which the Plaintiff is bound to maintain. But the Judge has no legal right either directly or indirectly to force upon the jury his view of any fact or inference of fact. Yet he will do so if he states questions of fact as if they were questions of law. For instance, when he asks whether what happened amounted to an invitation to the Plaintiff to alight. If he leaves that question without explanation, he leads the jury to conclude that if there was nothing amounting to an invitation, the Plaintiff in alighting must have been guilty of want of ordinary care. Yet, surely, he may not have been so guilty though there was nothing like an invitation. So when it is asked whether what was done or omitted amounted to a trap. The jurors are led to believe that if there was no trap the Plaintiff must have been guilty of a want of ordinary care or skill in alighting. Yet, again, he may not have been so guilty, though there was nothing like a trap. So when Judges have stated that the calling out of the name of a station is no intimation that the passengers may on the stopping of the train alight. That seems to me to be a matter of experience of life and habits, which is solely for the determination of the jury. And so, finally, when a Judge lays down that if such and such things were done, or omitted to be done, there was or was not a want of ordinary care or skill, he has, in my opinion, laid down a proposition of fact and not of law. What men of ordinary care and skill would or would not do under certain cir-

cumstances is matter of experience, and so of fact, which a jury only ought to determine. It seems to me that it will aid the consideration of what is the proposition or rule of law which is to govern the determination of a Judge whether there is or is not evidence fit to be left to a jury, to consider what duty with regard to facts is cast upon the Judge after the jury has found a verdict. He must undoubtedly determine whether the verdict is against the weight of evidence. Here, again, I think that a definite rule of conduct, or, in other words, a definite proposition for legal application, which is, I think, a proposition of law, to be applied to the facts in evidence, should be laid down. That proposition cannot be whether the Judge agrees in opinion with the jury. If so, the Judge has left to the jury evidence which he has already decided to be such as it is not unreasonable to act upon, and yet when it is acted on he overrules it. I do not speak here of the cases in which a Judge may, for precaution's sake, leave matter to the jury, reserving for more careful consideration by the Court the question whether there was evidence fit to be left to the jury. The proposition or rule of conduct to be applied to the consideration of the verdict seems to me to be identical with that to be applied to the evidence before leaving the case to the jury. It is, again, not whether the Judge would have decided in the same way, but whether the verdict is such as reasonable and fair men might not unfairly arrive at, or, in other words, whether the decision is such as would be clearly wrong in the judgment of the great majority of ordinarily reasonable and fair men.

The importance of the distinction as applied to this class of cases seems to me to be manifest. A Judge may be of opinion that the calling out of the name of the station ought not in any way to actuate the passenger; jury after jury may decide that according to the ordinary understanding both of railway officials and passengers it is an indication upon which a passenger may fairly rely that, directly the train stops he may, unless he receives some other warning, safely alight. A Judge may think that if a passenger himself opens the carriage door and alights, it is conclusive against him that he alighted without ordinary care; jury after jury may find that a passenger may, without being guilty of a want of ordinary care, himself open the door and alight. A

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Judge may propose this dilemma: If the passenger alights and falls when it is dark he is imprudent and cannot recover; if he descends and falls when it is light he is unskilful and cannot recover. A jury may find that neither part of this dilemma is true. If Courts or a Judge may overrule such decisions, because they or he do not agree with them, they ought logically to overrule decision after decision. And yet each successive decision would prove more distinctly the opinion of men of ordinary intelligence. If such decisions may be overruled on the mere ground that the Courts or Judges do not agree with them, juries are bound to matters of fact by the view of the Judges as to facts. This cannot be.

But if the proposition which I have intimated as correct be true, and be enunciated by the authority of your Lordships' House, the discussion will be narrowed, and it will be settled that the Judge in determining whether there is evidence fit to be left to the jury, and the Court or Judge, in determining whether a verdict is against the weight of evidence, ought not to decide on the mere ground of their or his own individual opinion, but to determine whether it can be truly said that men of ordinary sense and fairness might not decide in one way or the other. This view seems to me to be that adopted in the Court of Exchequer Chamber in *Cockle* v. *The South-Eastern Railway Company* (1).

My Lords, the paramount importance which I attach to the enunciation of a rule of conduct or of decision by your Lordships is, that it will prevent the decisions in these cases from being governed by the many different views taken by different Judges of facts of every day occurrence in life, and which no one can say are questions of law. The kind of discussion which may be found in this case in the Courts below, and the differing grounds of decision to be found in so many cases, would not be repeated.

Applying to the question proposed by your Lordships the rule I have submitted to be the right one, I cannot entertain any doubt that there was in this case evidence fit to be left to the jury, and I therefore answer your Lordships' question in the affirmative.

(1) Law Rep. 7 C. P. 321.

THE LORD CHIEF BARON:—

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THE LORD CHIEF BARON.

My Lords, having had the advantage of reading the opinions we have now heard delivered in this case by my brother *Denman* and my brother *Pollock*, in which, and in the chief reasons which they assign, I substantially concur; and having fully expressed the view I had taken upon the question now before your Lordships, in the judgment which I pronounced in the Exchequer Chamber, and which has been reported (1), I forbear to trouble your Lordships farther with the grounds upon which I submit that there was evidence of negligence on the part of the Respondents which ought to have been left to the jury; except, indeed, to observe that as it appears that upon the arrival of the train at the station at which the deceased was to alight, an officer or servant of the company called out the name of the station, it became a question whether the deceased was or was not justified in presuming that he might alight with safety at that spot, and if he was justified in so presuming, whether, under all the circumstances of the case, there was negligence on the part of the company in not warning the passengers in the tunnel that it would be unsafe for them to alight there. And these are questions which could not be determined as matters of law, and which I am therefore of opinion ought to have been submitted to the jury. Then inasmuch as it appeared that there was afterwards a cry of "Keep your seats," again a question arose whether that was heard by the deceased in time to prevent him from alighting, and this also being a mere question of fact, was obviously for the jury and not for the Judge to determine.

I am, therefore, of opinion that your Lordships' question should be answered in the affirmative.

THE LORD CHANCELLOR (Lord *Cairns*):—

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June 22.

My Lords, I regret the delay which has taken place in the decision of this case. It is a case in which, in consequence of a certain amount of difference of opinion among the learned Judges in the Courts below, your Lordships deemed it right to have the assistance of Her Majesty's Judges at the hearing of the appeal.

(1) Law Rep. 6 Q. B. 408.

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Your Lordships had the benefit of their presence in the last session of Parliament, but, from the circumstance that the learned Judges were about to leave town for the summer circuit, it was impossible for them to return an answer in the last session to the questions which your Lordships put to them. Their answer to those questions was however returned a few weeks since, and your Lordships have now to dispose of the case. [His Lordship here stated very minutely the facts of the case.]

16 Q.B.D. 147

My Lords, in this state of things I will point out to your Lordships, in the first place, that there are some of the facts which are perfectly clear and which admit of no dispute. It is perfectly clear that, before this accident occurred, the train had come to a standstill. It is perfectly clear that the carriage in which the deceased was seated was inside of the tunnel. It is equally clear that there was no platform opposite that part of the tunnel where his carriage stopped. It is perfectly clear that the tunnel at the place in question was, even on a clear night, imperfectly lighted; and on the night in question, the tunnel being filled with steam, it was practically without light. It is also clear that opposite the carriage where the deceased was seated there was, in place of a platform, a heap of hard rubbish; and it is clear that if the deceased in that state of things got out in the tunnel opposite this rubbish, he was exposed to the danger of receiving a fall from alighting on the rubbish in place of alighting on the platform.

Up to that point, my Lords, it appears to me that there neither is negligence nor evidence of negligence to go to a jury. It was not negligence to stop the train in the tunnel; it was not necessarily negligence not to have a platform in the tunnel. But the question, and the only question in the case, appears to me to be this: Was there evidence to go to the jury that in this state of things the company or its servants so conducted themselves as to lead to the deceased getting out of the carriage at the time that he did get out of it? Now, my Lords, I certainly do not desire to ask your Lordships to lay down any rule whatever as to what may be the consequence, as a positive rule of law, of calling out the name of a station by the officers of a company. But your Lordships will see that what was stated in evidence in this case, and, at the stage at which the trial stopped, was uncontradicted,

was this:—A passenger who was in the last carriage but one was called as a witness and gave evidence that he heard "*Highbury*" called at the far end of the platform. He got out, and after he got out he heard a warning, "Keep your seats;" after which the train moved on to the station. Hearing a groan, he had proceeded farther back into the tunnel, and found the deceased lying with his legs across the rails, having sustained injuries which it is admitted caused his death. Now, my Lords, in that state of things, the train having actually stopped, the servants of the company having called out "*Highbury*," a station at which the train was intended to stop, and the requisite time having elapsed (as was proved by the witness whom I referred to) for any of the passengers to get out and leave the carriage, and then the same servants of the company having corrected their mistake, and called out "Keep your seats," thereby admitting that the first call was an invitation to leave the seats,—in that state of things it appears to me that, without explanation or contradiction from the other side, there clearly was, upon the facts which I have stated, evidence to go to the jury of negligence on the part of the servants of the Defendants. My Lords, I am bound to say that if it had fallen to me to review a verdict of a jury given against a company under these circumstances, without any evidence to explain the facts which I have stated, I should have been of opinion that the jury had come to a natural and proper conclusion. But the only question which your Lordships have to deal with is, Was there in this case evidence of negligence to go to the jury? In my opinion there clearly was.

My Lords, the fate of this litigation is somewhat singular. The course of it appears to me to afford a strong and marked proof of the advantage which sometimes arises from a fresh hearing, by way of appeal, of a cause of this kind. At the trial, as I have stated to your Lordships, Mr. Justice *Blackburn* was of opinion that there was no evidence to go to the jury, and nonsuited the Plaintiff. On the application to the Court of Queen's Bench for a rule to set aside the nonsuit, there were present Mr. Justice *Blackburn*, Mr. Justice *Mellor*, Mr. Justice *Lush*, and Lord Chief Justice *Cockburn*. As I understand the observations of the Lord Chief Justice, he would himself have been of opinion, with a certain qualification, that there was evidence of negligence to go to the

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jury; but he said, if a rule was granted, it would be certain in that Court to be discharged, and therefore it was refused. I take it, therefore, that in the Court of Queen's Bench in this case there was that amount of difference of opinion to which I have referred. In the Court of Exchequer Chamber, four Barons of Exchequer, namely, Mr. Baron *Bramwell*, Mr. Baron *Channell*, Mr. Baron *Pigott*, and Mr. Baron *Cleasby*, were of opinion that the nonsuit was right, and that there was no evidence to go to the jury. The Lord Chief Baron, Mr. Justice *Willes*, and Mr. Justice *Keating*, were of a different opinion; therefore, there was a division of four against three. Your Lordships have had the benefit of the opinion of five learned Judges, two of whom were those who had already given their opinions in the Court below, namely, the Lord Chief Baron and Mr. Justice *Keating*, the other three being Mr. Justice *Brett*, Mr. Justice *Denman*, and Mr. Baron *Pollock*, and they are unanimously of opinion that there was evidence of negligence to go to the jury; and, so far as I am aware, any of your Lordships who heard the case would also have no doubt that there was evidence of negligence to go to the jury. Therefore, looking both to the advice of the learned Judges to this House, and to the opinion of your Lordships, I think it may be taken that there has been no difference of opinion in this House that there was evidence to go to the jury. I think that that unanimity has been arrived at from the repeated hearings of this case, which have no doubt caused some delay and some expense; but I trust the case may be found useful in future as negativing the idea that, under circumstances such as I have described, a case is to be withdrawn from the jury, and the mind of the jury not to be farther exercised upon it.

My Lords, I submit to your Lordships that the proper course is to reverse the judgment of the Exchequer Chamber, and (as has been agreed shall be done) to direct that, in the Court of Queen's Bench, judgment shall be entered up for the sum assessed by the jury, namely, £1200.

LORD HATHERLEY (1):—

My Lords, I entirely concur with the views taken of this case by the noble and learned lord on the woolsack, and concurring

(1) Lord *Colonsay* heard the argument, but died before the judgment was delivered.

with him especially in that part of his observations in which he stated that he thought we were not bound to lay down any special rule as to what the effect of calling out the name of a station would be, I cannot help observing that when the name of a station has been called out, accompanied by a stoppage, and a considerable interval has elapsed (as has been proved by the evidence of a passenger to have occurred in this case), there is a certain amount of evidence to go to the jury to authorize the finding of a verdict for the Plaintiff, unless some explanation could be given of the facts by the Defendants, instead of their merely submitting that the Plaintiff had not produced sufficient evidence to call upon them for a defence.

It is curious to remark how strongly the evidence, when you examine it, bears upon the interval of time during the stoppage. It appears that the passenger who gave evidence got out just as the unhappy passenger who was killed may have got out, and after he had got out he heard the warning, "Keep your seats," after which the train moved on into the station. And then the case says: "The witness, hearing a groan, proceeded farther back into the tunnel." At first you might read that as meaning that he heard the groan after he had heard the cry, "Keep your seats," and after the train had moved on into the station. But if you look narrowly into it, you will find that is not so, and that the train had not moved on when he heard this groan; for, having heard a groan, he proceeded farther back into the tunnel and found the deceased lying with his legs across the rails between the wheels of the carriage, and his body upon the rubbish—the wheels had not touched his legs or body. It is obvious that there could have been no motion forward, as his legs were between the wheels without the wheels touching him, and therefore it must have been a considerable time that this train was so stopped. The other passenger not only gets out, but has time to hear this groan, and has time to find the unhappy deceased with his legs between the wheels, and has time to find that the wheels have not moved on, or in any way touched him. The death was therefore occasioned in consequence of the fall. Now, in that state of circumstances, the train having stopped a sufficient length of time to enable these two passengers to get out, and it not having been established in

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any way that the cry, "Keep your seats," was made before these passengers got out—indeed, as regards one of them, it was clearly made after he had got out—I say, in this state of circumstances, I think it would be very strong to say that there was not evidence to go to the jury in this case.

2 C P D 130

My Lords, I entirely concur with the course proposed to be taken by my noble and learned friend on the woolsack.

Judgment of the Court of Exchequer Chamber reversed, and the verdict to be entered for the Plaintiff for the sum of £1200.

Lords' Journals, 22nd June, 1874.

Attorney for Appellant: *James Fluker.*
Attorney for Respondent: *James Blenkinsop.*

With reference to the effect of an intimation conveyed to the public by the acts of railway officials, see *The North-Eastern Railway Company* v. *Wanless, ante*, p. 12.

THE CHAIRMAN, &c., OF THE METROPOLITAN BOARD OF WORKS . . . } PLAINTIFFS IN ERROR;

AND

OWEN McCARTHY . . . . . } DEFENDANT IN ERROR.

1874
May 8, 11;
June 22.

Sect. 68 *of Lands Clauses Consolidation Act*, 1845—"*Injuriously affected.*"

In order to found a claim to compensation under the 68th section of the *Lands Clauses Consolidation Act*, 1845, for an interest in land "injuriously affected," there must be an injury and damage, not temporary but permanent, peculiarly affecting the house or land itself in which the person claiming compensation has an interest. A mere personal inconvenience, obstruction, or damage to a man's trade or the goodwill of his business will not be sufficient, although any one of them might, but for Act of Parliament which authorizes the doing of the thing occasioning the injury, have been the subject of an action against the person occasioning it.

Chamberlain v. *The West of London Railway Company* (1) and *Beckett* v. *The Midland Railway Company* (2) approved. *Ricket* v. *The Metropolitan Railway Company* (3) explained and affirmed.

M. was the lessee or occupier of a house in close proximity to a draw-dock which opened into the *Thames*. He had no right, in any way, to the use of the dock, except as one of the public; but his premises being in close proximity to it, his use of it for the purposes of his business was very constant. The dock was entirely destroyed by the works of the *Thames Embankment*. *M.* sought compensation. The Case submitted to the Court stated, "That by reason of the destruction of the dock, and the destruction thereby of the access to and from the *Thames*, the Plaintiff's premises became and were, as premises either to sell or occupy in their then condition, and with reference to the uses to which any owner or occupier might put them in their then state and condition, permanently damaged and diminished in value:"

Held, that the Plaintiff was, on these facts, entitled to compensation.

Per LORD PENZANCE:—The Legislature in authorizing works and taking away any rights of action which the owner of land would have had if the works had been constructed without such authority, intended to confer on such owner a right to compensation co-extensive with the rights of action of which the statute had deprived him, but no more; not to improve the position of the person injured by the passing of the Act.

Per LORD PENZANCE:—The right to compensation will accrue whenever it can be established that a special value attached to the premises by reason of

(1) 2 B. & S. 605-617. (2) Law Rep. 3 C. P. 82.
(3) Law Rep. 2 H. L. 175.

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their proximity to or relative position with the highway obstructed, and that this special value has been permanently injured by the obstruction.

LORD O'HAGAN fully concurred with the judgment in this case, but intimated his opinion that the observations of Lord *Westbury* in *Ricket* v. *The Metropolitan Railway Company* (1), had laid down the correct rule for construing the 68th section of the *Lands Clauses Consolidation Act*, 1845. The Legislature never intended that the community should profit at the expense of a few of its members.

IN this case Mr. *McCarthy* had claimed compensation for an injury occasioned to his property by the works of the *Thames Embankment*. The ordinary proceedings were taken, and the jury summoned under the *Lands Clauses Compensation Act*, 1845, had assessed the damages at £1900. The Board declined to pay this sum, alleging that under the Act no compensation could be claimed in this case. *McCarthy* then brought an action in the Court of Common Pleas to recover the amount assessed. The facts were there turned into a special case.

The Case stated in substance that the Plaintiff *McCarthy* resided and carried on business, as a carman and contractor for supplying builders with lime, bricks, and other building materials, and as a dealer in sand and ballast, near a dock known as the *Whitefriars Dock*, which was a draw-dock leading into the River *Thames*, which dock was largely used by the Plaintiff in the way of his business. This dock was a free and open public dock, but was principally used by the Plaintiff, by the *City Gas Company*, by the Commissioners of Sewers for the *City*, and by the other persons whose premises were in close proximity to it. The Plaintiff had no right or easement in the dock other than as one of the public, nor was there, appurtenant or otherwise belonging to his premises, any other right or privilege in or to the dock. The dock was of the length of 352 feet, 30 feet wide at its head or northern part, and 46 feet wide at its outlet into the *Thames*. By reason of the proximity of the dock to the Plaintiff's premises (from which its head was only 20 feet distant), and the access thereby given to and from the *Thames*, the premises were rendered more valuable to sell or occupy with reference to the uses to which any owner might put them. In the execution of the works authorized by the *Thames Embankment Acts*, a solid embankment was carried along

(1) Law Rep. 2 H. L. 175.

the foreshore of the *Thames*, thus permanently stopping up and destroying the *Whitefriars Dock*. By reason thereof access through the dock to and from the *Thames* was destroyed, and the Plaintiff's premises became and were as premises, either to sell or occupy, with reference to the uses to which any owner or occupier might put them in their then state and condition, permanently damaged and diminished in value. If the Court should be of opinion that under the circumstances thus stated the Plaintiff was entitled to compensation, the verdict was to be entered for him for £1900 and costs. Otherwise, a *nolle prosequi* was to be entered.

In May, 1872, the Court of Common Pleas, consisting of Justices *Willes* and *Keating* (1), gave judgment in favour of the Plaintiff, and on appeal to the Exchequer Chamber that judgment was affirmed by the Lord Chief Baron, Baron *Bramwell*, Baron *Channell*, Justice *Blackburn*, and Justice *Archibald;* Baron *Cleasby* dissenting (2).

This proceeding in Error was then brought.

Mr. *Philbrick*, Q.C., for the Plaintiffs in Error:—

The real question in this case is, whether a person whose interests are affected by the consequences of the execution of public works, but affected merely as one of the public, he having no title to any benefit except as one of the public, and whose land and premises have not been injured by the works, can maintain a claim for compensation. No part of the land of *McCarthy* has here been taken, nor any structural damage done to his house. He is not, therefore, entitled to claim compensation within those cases where, for such causes, compensation has been given; but his case rather falls within the principle of *Ricket* v. *The Metropolitan Railway Company* (3), where it was refused. He has no such claim even as was admitted in the case of the *Duke of Buccleuch* v. *The Board of Works* (4), for there the Plaintiff had an easement of which he was entirely deprived. Here the Plaintiff had none. It is so found in the case. All that he had was that power of using the *Whitefriars Dock* which he enjoyed in common with all the Queen's subjects, though, of course, his proximity to the dock

(1) Law Rep. 7 C. P. 508.
(2) Law Rep. 8 C. P. 191.
(3) Law Rep. 2 H. L. 175.
(4) Law Rep. 5 H. L. 418.

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made it more convenient for him than it would have been for others to use it. In *Chamberlain* v. *The West of London, &c., Railway Company* (1), where compensation was granted, there was a distinct finding that the premises were injured; there was no finding of the sort here, where the only claim was that the use of something over which the Plaintiff had no easement, and which he could and did use in his business only, and as any one of the public might have used it in any other business, had been lessened. That was not a ground for compensation. It had been expressly decided that loss to trade was not so. The injury to be compensated must be, not to the person or to the trade, but to the land: *Beckett* v. *The Midland Railway Company* (2), where Mr. Justice *Willes* said (3), "to entitle a claimant to compensation under the *Lands Clauses Consolidation Act*, 1845, two things must concur, viz., that he has sustained a particular damage from the execution, by the company, of the works authorized by the special Act, and that the damage was one for which he might have maintained an action if the work had not been authorized by Parliament." The decision there was, that the injury must be to the property itself, and not in respect of any particular use to which the property might be put. That principle had been previously declared in this House in *The Caledonian Company* v. *Ogilvy* (4). There, a railway had been made to cross a public road on the level, within a very short distance of a gentleman's house. The inconvenience resulting was considerable, but this House (reversing the decision of the Court of Session) held that the inconvenience felt in such a case was one to which all the Queen's subjects were exposed, and for which no particular or individual remedy existed. The words in the Act there (5) were, as they are here, "injuriously affected," and this House held that what had been done could not be treated as coming within those words. Lord Chancellor *Cranworth* considered it to be perfectly clear that for the purpose of claiming compensation the property itself must be "materially damaged," and Lord *St. Leonards* entirely concurring in that opinion elaborately discussed all the cases which seemed to him to have established it. *In*

(1) 2 B. & S. 605–617.
(2) Law Rep. 3 C. P. 82.
(3) Law Rep. 3 C. P. 94.
(4) 2 Macq. Sc. Ap. Cas. 229.
(5) 8 & 9 Vict. c. 19 (Sc.)

(11 Sc & Jur N.S. 935; 9 Jur N.S. 1051

re Penny (1) asserted the same doctrine, and there, too, it was expressly declared by Lord *Campbell* (2), that "Unless the particular injury would have been actionable before the company had acquired statutory powers, it is not an injury for which compensation can be claimed." Here no action would have lain, for no legal right, no title to property, nor even to an easement, existed in the Plaintiff. *Chamberlain* v. *The West of London, &c., Railway Company* (3) does not weaken the effect of these decisions, for there it was found that the houses themselves were, as far as the property in them was concerned, "injuriously affected," and on that ground compensation was awarded. If that case is rightly understood, it is entirely consistent with the judgment of this House in *Ricket* v. *The Metropolitan Railway Company* (4), and the principle is perfectly clear. If a different principle was acted on, then, as the effect of opening a new street would be to divert the traffic from the old street, the inhabitants of the latter would be entitled to compensation for the loss of their business, a result which nobody pretends could be allowed. An unfailing test of the right to maintain a claim for compensation is whether there could be an action maintained for the same cause: *Moore* v. *The Great Southern and Western Railway of Ireland* (5); though it did not follow that because an action might be maintained therefore a statutory compensation could be recovered; for if the acts done were done by the authority of the Legislature, no such compensation was demandable: *Tuohey* v. *The Same Company* (6). In *Moore's Case* the road, a public highway, was cut down seven feet, leaving the entrance to the Plaintiff's land and cottage on the edge of a precipice of that height; and in *Tuohey's Case* the road was raised ten feet, by which not only was the access to the house rendered inconvenient, but the house was rendered damp and unwholesome by the rain and mud which penetrated into it; but in neither of these cases was the party allowed to maintain an action for damages, for it was held that what had been done had been so done under the authority of the Act. A similar ground of decision existed in *Rex* v. *The London Docks Company* (7), and *The Hammersmith Railway*

(1) 7 El. & Bl. 660.
(2) Ibid. 669.
(3) 2 B. & S. 605–617.
(4) Law Rep. 2 H. L. 175.
(5) 10 Ir. Com. Law Cas. (N.S.) 46.
(6) Ibid. 98.
(7) 5 Ad. & El. 163.

(1 H C 3 Jur N S. 957
12 H C 8 Jur N S 985 9 Jur N S. 1357

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Company v. *Brand* (1). *The Queen* v. *The Metropolitan Board of Works* (2) is exactly like the present case. In virtue of a public right only, and not in virtue of any right attached to his premises, the party there complaining had been accustomed to draw water from the *Thames*, and to use a draw-dock, and having lost these advantages he sued for compensation; but under the authority of *Ricket's Case* (3) was declared not entitled to it. In *Beckett* v. *The Midland Railway Company* (4) an opposite result took place; but the observation of Mr. Justice *Willes* (5), already quoted, shews what the Court thought as to the facts that could alone give a Plaintiff a right to claim compensation, and compensation was, in fact, awarded there, because the Court was clearly of opinion that the value of the house itself had been "injuriously affected," so that in that case the claim for damages in respect of a personal or a trade injury was not only not admitted but was rejected. Here the Plaintiff only claims in respect of an injury to him in the mode of carrying on his trade and business, and such a claim cannot be supported. There has not been in this case any injury to the house itself.

Mr. *Prentice*, Q.C., and Mr. *Thesiger*, Q.C., for the Defendant in Error:—

Much of the argument on the other side is inapplicable here, for the Plaintiff, *McCarthy*, only claims a compensation for the injury to his property, for the diminished value of his house. The claim is thus stated in the case: "By reason of the stopping up and destruction of the said dock, and the destruction thereby of the access to and from the *Thames*, the Plaintiff's said premises became and were, as premises, either to sell or occupy in their then state and condition, . . . permanently damaged," &c. That is not a personal injury, nor a claim for compensation in respect of loss of trade, but for injury to the value of the property itself, and falls directly within the 68th section of the *Lands Clauses Consolidation Act*, 1845. His premises have been and are "injuriously affected." This is not like obstructing the view from a

(1) Law Rep. 4 H. L. 171.
(2) Law Rep. 4 Q. B. 358.
(3) Law Rep. 2 H. L. 175.
(4) Law Rep. 3 C. P. 82.
(5) Law Rep. 3 C. P. 94.

house, or occasioning a falling off in the trade formerly carried on there. The case really comes within the description contained in the words of Mr. Justice *Willes* in *Beckett* v. *The Midland Railway Company* (1), where he quotes and adopts a passage from *Comyns'* Digest (2): "If *A.* has a colliery, and *B.* stops up a highway near it, whereby nothing can pass to such colliery, an action upon the case lies, for he ought to be remedied in particular, though it was a highway for all." So that, assuming what has been contended for, that no claim for compensation can exist where no action can lie, it is clear that in this case an action would lie for the injury occasioned to the Plaintiff's premises. *The Caledonian Railway Company* v. *Ogilvy* (3) does not affect this case, for there the claim for damages was nothing but a claim in respect of personal inconvenience; but *Chamberlain* v. *The West of London, &c., Railway Company* (4) and *Beckett* v. *The Midland Railway Company* (5) are both in the Plaintiff's favour. The principle to be deduced from a consideration of all the cases is this, that where by the construction of works there is a physical interference with any right, public or private, which an owner is entitled to use in connection with his own property, he is entitled to compensation if, by reason of such interference, his own property is injured. The word "physical" is here used in order to distinguish the case from cases of that class where the interference is not of a physical, but rather of a mental, nature, or of an inferential kind, such as those of a road rendered less agreeable or convenient, or a view interfered with, or the profits of a trade, by the creation of a new highway or street, diminished in the old one. And in like manner the words "a right, public or private, which the owner of property is entitled to make use of," apply to this case and distinguish it from such cases as *The Hammersmith Railway Company* v. *Brand* (6). There no right, public or private, was interfered with, and the claim for compensation was made in respect of the injury to the enjoyment of the property, which injury was the foreseen and inevitable consequence of the railway authorized by Parliament to be constructed. An absolute taking of the land, or an injury to the structure of the house, is not necessary to found a claim for

(1) Law Rep. 3 C. P. 97.
(2) Action upon the Case, A.
(3) 2 Macq. Sc. Ap. 229.
(4) 2 B. & S. 605–617.
(5) Law Rep. 3 C. P. 82.
(6) Law Rep. 4 H. L. 171.

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compensation. If the house is permanently diminished in value, the property is "injuriously affected," and the claim for compensation arises. The cases of *Moore* v. *The Great Southern and Western Railway Company of Ireland* (1) and *Tuohey* v. *The Same* (2) have no application here. They simply decided that the proper mode of proceeding was not an action for damages for the injury done under the authority of the Railway Act. An argument, relied on by one of the Judges in the Court below in this case was, that if this claim was allowed there would be no end to the difficulties in ascertaining claims of this sort; that is not to be regarded. If such difficulties exist they must be overcome. That was shewn in the observations of Lord *Cairns* in the case of *The Hammersmith Railway Company* v. *Brand* (3). The amount of the deterioration of property from the destruction of a particular advantage which it once possessed can easily be ascertained. It has been ascertained here, and the supposed difficulty has no existence. It cannot be denied that where access to a house is interfered with, injury is done to the property, and compensation ought to be given. If access is altogether taken away the house becomes valueless; if partially taken away, then it is a question of degree, but the amount of the injury can be calculated. The principle of the *Buccleuch Case* (4) is exactly applicable here, and there it was said (5) that the *Thames Embankment Act* "contemplated two species of damage likely to be sustained by the owners of lands on the bank and river frontage of the *Thames;* one by the loss of the river frontage, the other in any other manner by reason of the embankment or other the exercise of any of the powers of the Act." This case falls within the latter class. This is a case in which, but for the Act of Parliament, an action would lie: *Rose* v. *Miles* (6); *Dobson* v. *Blackmore* (7). In both those cases the Plaintiff's use of a navigable river was interrupted, he was entitled to that use only as one of the public, but he suffered by the interruption a particular damage, and so he was held entitled to maintain an action. *Rex* v. *The London Docks Company* (8)

(1) 10 Ir. Com. Law Rep. (N.S.) 46.
(2) Ibid. 98.
(3) Law Rep. 4 H. L. at p. 223.
(4) Law Rep. 5 H. L. 418.
(5) Law Rep. 5 H. L. at p. 460.
(6) 4 M. & S. 101.
(7) 9 Q. B. 991.
(8) 5 Ad. & E. 163.

does not affect this case, for there compensation was refused on the ground that the thing complained of was the very thing which the Act in terms expressly authorized to be done, and the injury was the necessary consequence of doing it, and was a consequence which must have been foreseen by the Legislature. It may be doubted, however, whether that case can properly be considered as an authority, and it can hardly be reconciled with the subsequent case of *Reg.* v. *The Eastern Counties Railway Company* (1); besides which, the words in the *Lands Clauses Consolidation Act* giving compensation are stronger and more extensive than were the words in the Acts on which those cases depended. The case of *Rex* v. *The Bristol Dock Company* (2) carried to the fullest length the doctrine that an individual could not claim private compensation for a loss which he shared in common with the rest of the community; but there was this distinction between that case and the present, that there the complainants had not, in addition, suffered any particular damage, here the Plaintiff had suffered it. [LORD PENZANCE:—More than the rest of the subjects.] And in *Ricket* v. *The Metropolitan Railway Company* (3) this House had thought that there was no proof of any particular damage. *Reg.* v. *The Metropolitan Board of Works* (4) is the strongest case against the Plaintiff, but there the Court might probably have been influenced by the fact that the places from which the water was taken, and to which the manufactured article was sent, were sufficiently distant from the premises of the complainant as to make it difficult to shew what was the amount of injury he had sustained. There was no such difficulty here.

Mr. *Philbrick*, in reply:—

All the cases shew, that where a work is by Parliament authorized to be done, a person who seeks compensation for an injury alleged to be caused thereby must establish not merely the existence of a private injury or a loss of the profits of his trade, but an injurious affecting of his property itself. Nothing of the kind is shewn here. The alleged loss in the value of the house is really nothing but a loss created by the loss of a personal con-

(1) 2 Q. B. 347.
(2) 12 East, 429.
(3) Law Rep. 2 H. L. 175.
(4) Law Rep. 4 Q. B. 358.

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venience in carrying on the trade there. The house itself is not touched in any way; and if, to claim compensation, there must be, as it is admitted, "a physical injury," none has been committed here, and no claim to compensation exists.

THE LORD CHANCELLOR (Lord *Cairns*):—

My Lords, this is a case in which error has been brought before your Lordships to obtain the reversal of a judgment of the Court of Common Pleas, which was affirmed by the Court of Exchequer Chamber. The judgment of the Court of Common Pleas was the judgment of Mr. Justice *Willes* and Mr. Justice *Keating*, and the judgment of the Court of Exchequer Chamber was the judgment of the Lord Chief Baron, Mr. Baron *Bramwell*, Mr. Baron *Channell*, Mr. Justice *Blackburn*, and Mr. Justice *Archibald*, the only dissenting Judge being Mr. Baron *Cleasby*.

My Lords, the facts of the case are stated shortly in the case itself, and I will just remind your Lordships of them:—[His Lordship here stated them.]

Upon this state of facts your Lordships have to decide one of the cases of which so many come before the Courts of Law and also before your Lordships' House, turning upon the meaning of the two words in the *Lands Clauses Consolidation Act*, "injuriously affected." In the observations I am about to make to your Lordships, I propose entirely to accept the test which has been applied both in this House and elsewhere, as to the proper meaning of those words as giving a right to compensation, namely, that the proper test is to consider whether the act done in carrying out the works in question is an act which would have given a right of action if the works had not been authorized by Act of Parliament. I do not pause to inquire whether or not, if the question was now to be decided for the first time, it is not a test somewhat narrow. I accept that test as being the test which has been laid down, and which has formed the foundation for the decision of so many cases before the present.

Now, my Lords, divesting the present case of the more precise description which I have read from the Case, it appears to me to amount to this:—The occupier or tenant of a house has got in front of his house two highways, the one highway being a road or

a street, and the other, immediately beyond and abutting upon the road or the street, being a highway by water. The highway by water is taken away from him—the highway by land remains. It appears to me that it is impossible to doubt that the destruction of the highway by water, situate as I have described it, is otherwise than a permanent injury to the property in question, by whomsoever, or for whatsoever purpose, that property may be occupied. The case appears to me to be extremely analogous to a case decided by the Court of Common Pleas before the present case, the case of *Beckett* v. *The Midland Railway Company* (1), in which there was, in front of the premises in question in that case, one single highway, the farther half, or the farther third portion of which was taken off and blocked up by the execution of the Defendant company's works. It was there held that that was an injury which permanently and injuriously affected the premises in question: and it appears to me to be a matter entirely indifferent whether you have one highway, the farther half of which is blocked up and destroyed, or whether you have a double highway, first by land and then by water, and the part of the highway which consists of water is blocked up and destroyed.

My Lords, in his very able argument at your Lordships' Bar, Mr. *Thesiger* stated what he would rely upon as a definition of the right to compensation, and having considered this case very fully, I myself should not be disposed to find fault with any part of that definition, although definitions are always matters of very considerable difficulty. Mr. *Thesiger* stated that the test which he would submit as one which he thought would explain and reconcile the various cases upon this subject, was this, that where by the construction of works there is a physical interference with any right, public or private, which the owners or occupiers of property are by law entitled to make use of, in connection with such property, and which right gives an additional market value to such property, apart from the uses to which any particular owner or occupier might put it, there is a title to compensation, if, by reason of such interference, the property, as a property, is lessened in value.

My Lords, a case was decided in your Lordships' House which at first sight was supposed to militate against this proposition and

(1) Law Rep. 3 C. P. 82.

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against the decision in the present case—I mean the case of *Ricket* v. *The Metropolitan Railway Company* (1)—but in truth that case has no application whatever to the present. The circumstances out of which the claim was there made were these:—There was an interruption—only a temporary interruption—to a particular trade carried on in particular premises, and the claim made was not a claim for injury to the property at all, it was a claim in respect of loss suffered in carrying on a trade. My Lords, the words of the definition which I have read are entirely clear of a case of that kind, and although it is unnecessary to do so, I may observe that I do not think your Lordships would in any way propose now to depart from the decision in *Ricket* v. *The Metropolitan Railway Company* (1).

I submit to your Lordships that the course to be taken upon this appeal is to affirm the judgment of the Court of Exchequer Chamber, and to dismiss the appeal.

LORD CHELMSFORD:—

My Lords, I agree in the opinion expressed by my noble and learned friend that the judgment of the Court of Exchequer Chamber is right, and ought to be affirmed.

The question to be determined is whether, upon the facts stated on the special case, the Respondent's interest in his premises has been "injuriously affected" by the works of the Appellants within the meaning of the 68th section of the *Lands Clauses Consolidation Act* (8 & 9 Vict. c. 18).

The Judges in the Exchequer Chamber who decided this case in favour of the Respondent appear to have been governed in their opinion principally by the case of *Chamberlain* v. *West End of London, &c., Railway Company* (2), and entered very fully into the consideration of the question whether that case would be regarded as having been overruled by the decision of this House in the case of *Ricket* v. *The Metropolitan Railway Company* (1). I confess it appears to me extraordinary that so much time should have been occupied upon a question upon which, from the language I used, and which chiefly engaged the attention of the learned Judges, I should have thought there could be no doubt.

(1) Law Rep. 2 H. L. 175, 191 *et seq.*

(2) 2 B. & S. 605, 617.

I took some pains to distinguish the two cases. After adverting to the opinion of Chief Justice *Erle* in *Chamberlain's Case* (1), which proceeded entirely upon the facts found by the umpire, that the value of the houses was depreciated, because the highway was stopped up and the easy access which before existed to them was taken away, I observed (2) that the case must be classed with the preceding cases where the house or land of the person claiming compensation was itself injuriously affected. By these words I plainly expressed the distinction between the two cases, because in *Ricket's Case* (3) the jury found that there was no damage done to the structure of the house, *i.e.*, to the premises; and the question in the special case for the opinion of the Court was, "whether the loss of customers by the Plaintiff in his trade was such damage as to entitle him to recover from the company?" (4) Having classed *Chamberlain's Case* (5) amongst those where the premises themselves were injuriously affected, and having thus, as I supposed, sufficiently distinguished it from the case under consideration, I did not think it necessary to express any opinion as to the correctness of the decision itself. But I may now say that the umpire having found that by the construction of the railway across the high road the access to the houses of *Chamberlain* was rendered less convenient, and by reason of the premises their value had been greatly diminished, I do not see how the Court could well come to any other conclusion than that the houses were injuriously affected. Part of the damage in this case of *Chamberlain* was stated to have arisen from the obstruction having prevented many persons who would otherwise have passed the houses from doing so. This in itself would have been no ground for compensation, but without it sufficient remained in the statement of the interference with the access to the houses, and the consequent diminution of their value, to bring the case within the compensation clause in the *Railways Clauses Consolidation Act*. With great respect to Mr. Justice *Blackburn*, I think that if he had adverted more particularly to the different findings in the cases of *Chamberlain* and *Ricket* respectively, he might possibly have been disposed to agree in the

(1) 2 B. & S. 605, 617.
(2) Law Rep. 2 H. L. 191.
(3) Law Rep. 2 H. L. 175.
(4) Ibid. 177.
(5) 2 B. & S. 605.

45 & 46 Vict. c. 35. 9 Jur. N.S. 1057.

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distinction between them. Leaving these somewhat irrelevant considerations, but which, from the observations made by some of the learned Judges in the Courts below, I could not wholly omit to notice, I proceed to the question immediately before your Lordships.

After the many irreconcilable decisions upon the compensation clauses in the *Lands Clauses Consolidation Act*, and the *Railways Clauses Consolidation Act*, I think we may be said to have arrived at some settled conclusions upon the subject. It may be taken to have been finally decided that in order to found a claim to compensation under the Acts there must be an injury and damage to the house or land itself in which the person claiming compensation has an interest. A mere personal obstruction or inconvenience, or a damage occasioned to a man's trade or the goodwill of his business, although of such a nature that but for the Act of Parliament it might have been the subject of an action for damages, will not entitle the injured party to compensation under it. Some uncertainty still remains as to the particular character of the damage and injury to the house or land itself upon which a claim to compensation may be founded.

The learned Counsel for the Respondent proposed the following rule as a guide to the decision of each case. Where by the construction of works authorized by the Legislature there is a physical interference with a right, whether public or private, which an owner of a house is entitled by law to make use of, in connection with the house, and which gives it a marketable value apart from any particular use to which the owner may put it, if the house, by reason of the works, is diminished in value, there arises a claim to compensation. I think the rule as thus stated may be accepted with this necessary qualification, that where the right which the owner of the house is entitled to exercise is one which he possesses in common with the public, there must be something peculiar to the right in its connection with the house to distinguish it from that which is enjoyed by the rest of the world.

7 App. Cas. 272

The case of *Caledonian Railway Company* v. *Ogilvy* (1) furnishes an illustration of the propriety of the qualification of the proposed rule so far as it applies to an interference with a

(1) 2 Macq. Sc. App. 229.

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public right. There the claim for compensation was grounded upon the injury done to the Appellant's house as a residence and the deterioration of its value by the railway crossing the approach to the lodge and gate on a level immediately in front of and within a few yards of the gate, whereby the free and open communication with the high road was cut off, and all access prevented without a constant liability to very great inconvenience, interruption, and delay. This House held that the damage sustained was one which, though it might be greater in degree, was not different in kind from that to which all Her Majesty's subjects were exposed, who were also prevented having free and open communication with the high road, their access to it being in the same manner liable to interruption and delay.

The question therefore is, whether the Respondent, as the owner of premises which were in close proximity to the public draw-dock, has by its destruction suffered an injury and damage differing in kind from that of the public in general? It is to be observed that in *The Caledonian Railway Company* v. *Ogilvy* (1) there was no complaint of any interference with the access to the house, but the injury alleged was the interruption of access to the high road by a cause which was not in any way connected with the house, but which subjected the Plaintiff and his family to personal inconvenience, more frequently experienced indeed, but not differing from that which was felt by every individual of the public desirous of using the high road.

Now, it is stated as a fact in the special case here, that, by the access given by the dock to and from the river *Thames*, the Respondent's premises were rendered more valuable as premises to sell or to occupy with reference to the uses to which any owner might put them; in other words, that the access to and from the *Thames* by means of the dock was a valuable appendage to the Respondent's premises; and that, by the stopping up and destruction of the dock the premises became and were permanently damaged and diminished in value. Is not this an injury and damage to the Respondent distinct from what would be sustained by the public generally, though probably shared in by the other occupiers of premises in the neighbourhood of the dock? And what con-

(1) 2 Macq. Sc. App. 229.

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clusion could fairly be drawn from the statement, but that the Respondent's house was injuriously affected?

This case is clearly distinguishable from that of *Reg.* v. *The Metropolitan Board of Works* (1), although bearing some resemblance to it. There the occupier of premises near the *Thames* had been accustomed to exercise a public right of drawing water from the river, and to use a right of way or access to the river for that purpose, and also to resort to and use a public draw dock for loading and unloading barges. In the execution of works authorized by the *Thames Embankment Act*, the Defendants caused an embankment to be erected, by which the access to the river was practically cut off, and the access to the dock by barges was attended with difficulty and danger. It was held that the damage complained of was one for which the occupier of the premises was not entitled to compensation, that the injury was of a personal nature, the right interfered with being one which he possessed in common with the public, though, living near, he exercised it more frequently than others. There can be no doubt that that case was properly decided, as there was nothing to shew that the rights obstructed were in any peculiar manner connected with the claimant's premises, nor was there any finding that the premises were by the obstruction diminished in value. It is a case precisely similar to that of *The Caledonian Railway Company* v. *Ogilvy* (2).

The present case, as Mr. Justice *Willes* said, comes within the principle of *Beckett* v. *The Midland Railway Company* (3). There the Plaintiff was possessed of a house fronting on a public highway. The directors of the *Midland Railway Company*, under the powers conferred upon them by their special Act, erected an embankment on a portion of the highway opposite the Plaintiff's house, thereby narrowing the road from fifty to thirty-three feet, which occasioned inconvenience by compelling carriages to go some distance beyond his gate before they could turn. It was proved that the house was seriously damaged for occupation purposes and depreciated in value by the embankment and by the narrowing of the road. The part of the road encroached upon was the outer half, the part which was farthest from the Plaintiff's

(1) Law Rep. 4 Q. B. 358. (2) 2 Macq. Sc. App. 229.
(3) Law Rep. 3 C. P. 82.

premises. At the trial the jury found that the Plaintiff's house was diminished in value by the contracting of the road in front of it. The Court of Common Pleas held that this finding was warranted by the facts of the case. Chief Justice *Bovill* said (1): "If the claimant's right of access from or to the highway was taken away, nobody would doubt that he was entitled to compensation. If the entire destruction of the claimant's access, by raising, or lowering, or diverting the road, gives a cause of action or a right to compensation, I am at a loss to understand upon what principle it can be contended that the obstruction of a substantial part of it does not give the same right of action and compensation. In the one case the premises would be of no value, in the other their value would be substantially diminished."

Holding, as I do, *Beckett's Case* (2) to have been rightly decided, it appears to me that the present case is scarcely distinguishable from it. As in *Beckett's Case*, the Respondent's premises abut upon a highway, and his access from his premises to the river *Thames*, and from the river to his premises, was by means of this highway, which was partly land and partly water. The Board of Works narrowed the highway by destroying that part of it which consisted of the dock and which was farthest from his premises, and by this narrowing of the highway by the destruction of the dock the Respondent's premises are stated in the special case to have been permanently damaged and diminished in value.

I cannot help observing that the Judges in the Court below appear to me to have needlessly embarrassed themselves with the consideration whether this case is distinguishable from *Ricket's Case*. The distinction is marked and obvious. In *Ricket's Case* there was no finding which related to the premises, but merely of a personal damage; here the special case expressly states an injury and damage to the premises.

I think that the Court of Exchequer Chamber was right in holding that the Respondent's premises were injuriously affected within the meaning of the *Lands Clauses Consolidation Act*, 1845, so as to entitle him to compensation, and that the judgment ought to be affirmed.

(1) Law Rep. 3 C. P. 93.

(2) Law Rep. 3 C. P. 82.

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LORD HATHERLEY:—

My Lords, I entirely concur in the propositions which have been already submitted to your Lordships on the part of my noble and learned friends who have preceded me. All that we have to take care of is, that we do not extend the rule which has been wisely laid down, in cases where damage is occasioned to a person by any public works which have been constructed under an Act of Parliament for the purpose of a public improvement, with respect to the distinction between cases where you consider that the person injured is being injured as one of the public, and cases where you consider him as a person in a special manner "injuriously affected." It is quite obvious that no public works of any description whatever could be carried into execution if the whole of the public were to be entitled to pecuniary compensation by way of damages in respect of injury they might have sustained. Neither has Parliament so intended any such consequence to follow. But I believe the rule to be a sound one, that wherever an action might have been brought for damages if no Act of Parliament had been passed, the case is brought within the class of cases in which the property is "injuriously affected" within the meaning of the Act.

This case seems to me to be precisely following that of *Beckett* v. *The Midland Railway Company* (1), and not going one step beyond it. It would make no difference, that upon one side of his house there had been a road which he had a right to use for the purpose of access to his house for whatever purpose he occupied it, and this dock had been on the other side of his house, and he had been accustomed to use it for the purposes for which he occupied his house; then he would have had two accesses in fact, a water access on one side of the house and a land access on the other. I think there can be no doubt that the taking away one of those approaches would have been actionable at law, and that if it was done under a private Act his property would have been "injuriously affected" under the *Lands Clauses Consolidation Act.* Now the circumstance of this water access, as distinguished from the land access, lying immediately on the other side of the house from that which I have supposed, that is to say, its lying on the same side of the house as

(1) Law Rep. 3 C. P. 82.

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the land access, can, I think, make no substantial difference in the case.

My Lords, I am perfectly willing myself to adopt the definition, although it is necessarily a difficult one, and had to be expressed in language at some length, which the learned Counsel, Mr. *Thesiger*, in his able argument, submitted to us as a definition which might reconcile the various cases which have come before the Courts upon this delicate point of law. But the particular case we have before us seems to me to be simply governed by *Beckett's Case* (1), and I think on that account I need not more fully investigate the circumstances of it.

LORD PENZANCE :—

A rule has been established in these cases from which it would, I think, be disastrous to depart. It is this, that whether damage can be recovered under the words "injuriously affected" depends upon whether it might have been the subject of an action if the works which caused it had been done without the authority of Parliament. This interpretation of the statute was first, I believe, adopted in the case of the *Caledonian Railway* v. *Ogilvie* (2), decided in this House. That decision was followed, and acted upon with approbation, by Lord *Campbell* and the other Judges of the Queen's Bench in the case *Re Penny* (3). It has been consistently adhered to since, and has received a final authority in the careful and elaborate judgments pronounced in the case of *Ricket* v. *Metropolitan Railway Company* (4). Notwithstanding the doubts and adverse criticisms expressed in the last case by the late Lord *Westbury*, for whose great abilities no one has a higher respect than myself, I trust this rule will be adhered to, and continue to be the rule under which cases of this kind are ordered and disposed of. For it seems to me to rest upon reasoning of the simplest and plainest kind.

There are many things which a man may do on his own land with impunity, though they seriously affect the comfort, convenience, and even pecuniary value which attach to the lands of his neighbour. In the language of the law these things are

(1) Law Rep. 3 C. P. 82.
(2) 2 Macq. Sc. Ap. 229.
(3) 7 El. & Bl. 660.
(4) Law Rep. 2 H. L. 175.

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"*damna absque injuriâ*," and for them no action lies. Why then, it may surely be asked, should any of these things become the subject of legal claim and compensation, because instead of being done, as they lawfully might, by the original owner of the neighbouring land, they are done by third persons who, for the public benefit, have been compulsorily substituted for the original owners? It may reasonably be inferred that the Legislature, in authorizing the works, and thus taking away any rights of action which the owner of land would have had if the works had been constructed by his neighbour, intended to confer on such owner a right to compensation co-extensive with the rights of action of which the statute had deprived him. But on no reasonable ground, as it seems to me, can it be inferred that the Legislature intended to do more, and actually improve the position of the person injured by the passing of the Act.

There is another rule, which is, I conceive, well settled in these cases, namely, that the damage or injury, which is to be the subject of compensation, must not be of a personal character, but must be a damage or injury to the "land" of the claimant considered independently of any particular trade that the claimant may have carried on upon it. This was decided in *Reg.* v. *Metropolitan Board of Works* (1).

I proceed to apply these rules to the present case. It is admitted that the jurors have found that the Respondent's premises are permanently depreciated in value (independently of any special consideration relating to the trade there carried on) to the extent of £1900. And this depreciation has been caused by the stopping up, and wholly obliterating as a highway, of a portion of an approach to the river *Thames* which, before the works of the Appellants were made, flowed within a short distance of the Respondent's premises, and constituted a ready access by water between his premises and the great water highway of that river. If the Respondent's right, as owner of the land, to have access to that highway had been a private right of way, no doubt an action would lie for its disturbance and obstruction. But being a public right, it is said that the only remedy at law is by indictment. This is a well known rule, but governed and limited by an equally

(1) Law Rep. 4 Q. B. 358.

well known exception. It is upon the true meaning of this exception that the present case, in my opinion, wholly depends. It is well, therefore, to look back to the older cases in which this exception was first established to ascertain the exact terms in which it is expressed.

In *Iveson* v. *Moore* (1) the language of the Judges in the Exchequer Chamber affirming the exception and establishing the right of action was, that "the Plaintiff did necessarily suffer an especial damage *more than* the rest of the King's subjects." In *Ashby* v. *White* (2) the language was "still if any person have sustained a particular damage *beyond* that of his fellow-citizens," &c. The Judges do not say a damage of a *different kind or description* from that suffered by other subjects, but "more than" or "beyond" their fellow-citizens. The question then, is, whether when a highway is obstructed, the owners of those lands which are situated in a sufficient degree of proximity to it to be depreciated in value by the loss of that access along the highway which they previously enjoyed, suffer especial damage "more than" and "beyond" the rest of the public. It surely cannot be doubted but that they do.

The immediate contiguity to a highway, commonly called frontage, is a well known and powerful element in the value of all lands in populous districts. Where frontage to a high road does not exist, propinquity and easy access to a high road are equally undoubted elements of value in such districts, distinguishing lands which have them from those which have them not. If, then, the lands of any owner have a special value by reason of their proximity to any particular highway, surely that owner will suffer special damage in respect of those lands beyond that suffered by the general public if the benefits of that proximity are withdrawn by the highway being obstructed. And if so, the owner of such lands appears to me to fall within the rule under which an action is maintainable, though the right interfered with is a public one.

It was asked in argument where are the claims to compensation to stop if the rule be so applied? The answer I think is, that ir

(1) 1 Ld. Raym. 486; S. C. 1 Salk. 15.
(2) Sm. L. C. 4th Ed. vol. i. pp. 185, 212.

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each case the right to compensation will accrue whenever it can be established to the satisfaction of the jury or arbitrator that a special value attached to the premises in question by reason of their proximity to, or relative position with, the highways obstructed, and that this special value has been permanently destroyed or abridged by the obstruction.

If this limit be thought a wide one, and the number of claimants under it likely to be numerous, that is only the misfortune of the undertaking, for the limit does not exceed the range of the injury. On the other hand, all claim for compensation will vanish as, receding from the highway, the case comes into question of lands of which (though their owners may have used the highway and found convenience in so doing) it cannot be predicated and proved that the value of the lands depends on the position relatively to the highway which they occupy.

This view of the law on this subject and its application is, I think, entirely supported by the decision of the Exchequer Chamber in the case of *Chamberlain* v. *Crystal Palace Company* (1); and believing that case to have been rightly decided, I humbly advise your Lordships to affirm this judgment.

LORD O'HAGAN:—

My Lords, I entirely concur in the judgment which it is proposed to pronounce, and in the observations which have been made by my noble and learned friends who have preceded me. Undoubtedly the authorities which have been cited in the argument of this case are conflicting and not entirely satisfactory; but I confess, for my own part, I shall be quite prepared to adopt the definition which was submitted to your Lordships in the very lucid and powerful argument of Mr. *Thesiger* at the Bar. I think, having regard to that definition, that there is a very considerable reconcilement of the authorities, and your Lordships may very safely affirm the judgment of the Court of Exchequer Chamber in this case.

My Lords, if the matter were *res integra*, and ungoverned by any authority, I think on the facts as found it would be extremely difficult to answer the question submitted to your Lordships,

(1) 2 B. & S. 605.

whether the Plaintiffs' interest in his premises is injuriously affected within the meaning of the *Lands Clauses Consolidation Act*, 1845? in any way but one. The policy of that Act I apprehend to have been to prevent private caprice or selfishness from interfering with the prosecution of works designed for the public benefit; but to do this with strict regard to individual rights by securing ample compensation in every case in which individual sacrifice or inconvenience is found to be essential to the general good. It never contemplated that the community should profit at the expense of a few of its members, and, as the condition of redress, it only required proof by the owner of injury to his property.

In the particular case before your Lordships, if the question had been as to taking the whole of this property compulsorily from the owner of it, the principle of compensation would have been ample, full, and complete, so as to give a full indemnity to the individual. For my part, I confess I cannot see why that principle is not to be applied in the case of damage to premises, which may be more or less according to circumstances, and which in a conceivable case may absolutely be a destruction, or a taking away of the whole of the property, as much as if it had been in the first instance purchased against his will from its owner. I confess, my Lords, that if the case were entirely new, I should scarcely be disposed to agree in some observations which have fallen from my noble and learned friend who last addressed your Lordships. I should have doubted whether it was within the view of the framers of this Act of Parliament to make the possibility of bringing an action, if the Act of Parliament had not existed, a condition of compensation under the statute. I should have been very much inclined to agree with the strong observations made by Lord *Westbury* in *Ricket's Case* (1), to the effect that there really is not in the statute itself anything to justify the importation of a narrow construction of that description. It appears to me, or it would, as I have said, appear to me if the matter were *res integra*, and unaffected by decision, that wherever there is injury there ought to be compensation, and that the statutable claim which is now newly established, with new machinery for enforcing it, needs no help from any operation of ancient law.

(1) Law Rep. 2 H. L. 200, *et seq.*

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However, it appears to me to be now quite needless to raise that question, upon which there is a conflict of authority which I do not think has yet been absolutely settled; because in the case before the House, whether it be necessary to make the supposition of an action independently of the statute, or whether the contrary view be taken, the matter is none the worse for the claimant here. Even if the thing complained of be not within the new view of the clause with which we are dealing, unless it might have been the subject of an action, it seems to me that under the circumstances here an action would have lain. No doubt what is merely a common injury to all the world may be indisputable, but is not actionable. What is injurious in one way to all, may be supposed to be good in another way for all, and the common injury may be counterbalanced by the common benefit. But it is established law, in a case to which I think reference has already been made, the case of *Ashby* v. *White* (1), that if a person has sustained a particular damage beyond that of his fellow citizens, he may maintain an action in respect of that particular damage; and that is explained and enforced in the very learned notes by Mr. *Smith* on that case (2). Now, here the Plaintiff seems to me to have been clearly subjected to such a damage. He has a property which is so situated that the act, which may have been necessary or important for the public interest, has damaged it to a large extent, has damaged it permanently, and in such a way as to make it far less valuable by any change in the mode of using it. Is not this damage particular, and not such as the fellow citizens of the claimant generally experience? How is he to be indemnified for his special loss by the infinitesimal advantage which may accrue equally to him and to each of them? It seems to me unreasonable and unjust that he should be made involuntarily to suffer for the public benefit, or that he should not be recompensed for the real and peculiar loss he has undoubtedly sustained. For such a loss I think he might have recovered in an action before the statute, and I believe that if the statute has not enlarged, it certainly has not diminished, his right to make a like recovery in another way.

(1) 2 Ld. Raym. 938; 1 Salk. 19.
(2) Smith's L. C. 4th Ed. vol. i. pp. 185, 212.

Farther, I confess I should have great difficulty in holding that to entitle him to compensation the injury affecting his interest in his premises must have been, as was very powerfully urged at the Bar, an injury to the structure or substance. From the access to the river by the dock they had been made more valuable, by the loss of that access their value was permanently lessened. Is not a lessening of value an injury to premises, and an injury to the owner's interest in them? Why should a mere structural injury from infringement on a corner of the premises, or the removal of earth in contiguity to the walls, entitle to compensation, whilst an injury, not structural, but direct and clear and producing worse results to the unoffending owner—it may be one hundredfold or one thousandfold—be wholly remediless? It seems to me that here, again, a narrow qualification has been imported into the statute inconsistent with its policy and unwarranted by its terms. I do not see, with great respect to Lord *Cranworth's* opinion in *Ricket* v. *The Metropolitan Railway Company* (1), that it ought to matter, as to the effect and estimate of a real injury to premises and their owner, whether it is accomplished by work done beside, under, or upon them, or done at a distance from them, but so as directly and unmistakeably to have been the cause of that injury, which equally damnifies the owner in either case.

In my judgment, therefore, whilst an injury common in kind and in degree to the claimant and all the public, or merely personal to him, and not arising from the deterioration of the premises, or so remote as to be difficult or impossible of reasonable appreciation, may probably be held to form no claim to compensation, when, as here, the injury is particular, consists in the diminution of the value of a holding, is perfectly appreciable, and, in the particular case, has actually been appreciated to a considerable amount, I am strongly of opinion that it gives a clear title to compensation under the statute.

In the case of *Chamberlain* v. *The West End and Crystal Palace Railway Company* (2) Chief Justice *Erle*, in pronouncing the judgment of the Exchequer Chamber, says: "The umpire has found that the Plaintiff has suffered a particular damnification; he has found

(1) Law Rep. 2 H. L. 196.

(2) 2 B. & S. 636. 9 Jur. N.S. 955 9 Jur. N.S. 1057

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that the high road has been stopped up in close proximity to the Plaintiff's houses, and that the thoroughfare of the passengers past the houses has been put an end to, and that the Plaintiff's houses have been injuriously affected thereby. We are of opinion, therefore, that a particular damnification to the Plaintiff has been made out." Now, in this particular, *Chamberlain's Case* (1) appears to me to be wholly undistinguishable from the case before us. In neither was there any structural damage to the claimant's premises; in neither was there any actual disturbance of any portion of them by material impact or proximate disturbance of the soil. In *Chamberlain's Case* the highway stopped was about seventy yards from his house. In this case the draw-dock filled up was twenty-one feet from the Plaintiff's house. In the one case the obstruction of the road not nearly abutting on the house of *Chamberlain* prevented persons from passing along, diminished its value, and so, in the judgment of the Court of Exchequer Chamber, injuriously affected it. In the case before us the filling up of the dock, still nearer to the house of the Plaintiff, has had the effect of permanently lessening its value. If there was an injury to be compensated under the statute in the one case, I am unable to come to the conclusion that it does not exist in the other. Indeed, it seems to me that the circumstances of this case make it rather *à fortiori* for the application of the statutable remedy. Of course that decision to which I have been referring does not bind your Lordships' House; but I think it is sound in principle, is in advancement of the policy of the *Railways Clauses Act*, and is quite in accordance with its actual provisions.

That case was cited in both the Courts below, and in both of them it appeared to the majority of the Judges to be a conclusive authority. The only question really raised was, whether *Ricket's Case* (2) might be taken to have overruled it. It appears to me that, looking only to *Ricket's Case* (2) and *Chamberlain's Case* (1), the distinction is perfectly plain that the injury in the one case was temporary and personal, and in the other case permanent and to the premises. There were other distinguishing circumstances, to which my noble and learned friend has already referred; but

(1) 2 B. & S. 636. (2) Law Rep. 2 H. L. 196.

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I am very glad that we have now his authoritative declaration, sitting as he did as President of this House at the time, that *Ricket's Case* (1) was not decided upon any principle inconsistent with *Chamberlain's Case* (2).

I am therefore very clearly of opinion, my Lords, that in this case the judgment of the Court below ought to be affirmed.

Judgment of the Court of Exchequer Chamber affirmed, with costs.

Lords' Journals, 22nd June, 1874.

Attorney for Plaintiff in Error: *W. Wyke Smith.*
Attorney for Defendant in Error: *A. S. Edmunds.*

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June 29, 30.

THE PROPRIETORS OF THE CORK DISTILLERIES COMPANY. . . . . } PLAINTIFFS IN ERROR;

AND

THE DIRECTORS, &c., OF THE GREAT SOUTHERN AND WESTERN RAILWAY COMPANY (IRELAND) . . . . . } DEFENDANTS IN ERROR.

16 B.D. 63
24 Q.B.D. 42

Carriers—Consignees—Customs Duties.

Where goods are delivered by a vendor to a carrier to be carried to a certain place, with the added words, "for Messrs. . . . & *Co.*", these persons thus appearing to be the consignees of the goods, may demand them of the carrier at another place; and if on such demand, and on receiving payment for the carriage, the carrier (who has not received from the vendor any special communication on the subject of the place of delivery) delivers them up to the consignees, the carrier will not be responsible to the vendor for any damages which may arise to the vendor from such delivery.

Distillers in *Cork*, who were under bond to the Crown to pay the duties on all spirits which they might be permitted to remove from one bonded warehouse to another, sold a quantity of whisky to *S. & Co.*, spirit dealers in *Limerick*. The duty on the whisky had not been paid. The distillers obtained the regular *permit* for its removal (the permit expressly describing the whisky as spirit on which duty had *not* been paid) and delivered it to a railway company to carry it to *Limerick*. The delivery note described it as sent from *Cork* to "*Custom Warehouse, Limerick*. . . . For Messrs. *J. S. & Co., Limerick Station, Limerick.*" The railway company gave a receipt

(1) Law Rep. 2 H. L. 196. (2) 2 B. & S. 636.

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note in these terms, "From, &c. . . . One puncheon of whisky addressed to *Seymour's Customs Warehouse* at *Limerick*. For *J. S. & Co.*" If it had been taken to the customs warehouse the consignees could not have obtained possession of it without having first paid the duty on it, but no special communication was made by the vendor to the carriers on this subject. Before arriving there the consignees, *J. S. & Co.*, demanded it at the railway station, and on paying the carriage obtained possession of it, and thus escaped paying the duty. The vendors were compelled under their excise bond to pay the duty, and brought an action against the carriers for the amount:—

Held, that this was the case of an ordinary consignment; that the consignees had the right to demand the whisky from the carriers; and that the latter were not liable to make good the loss occasioned to the distillers by its delivery.

IN this case the Plaintiffs complained of the wrongful delivery by the Defendants of several puncheons of whisky, which had been intrusted to the Defendants to carry from *Cork* to *Limerick*, to be delivered at the Customs warehouse there. The summons and plaint set forth that the Plaintiffs were incorporated as a company limited by shares, for the purpose, amongst others, of the distillation and sale of spirits, and were under an obligation in writing for £10,000, to Her Majesty, with a condition thereunder written that if all spirit transmitted by the Plaintiffs from one inland revenue duty-free warehouse to another, &c., under permits, &c., should arrive without alteration, &c., and within the time specified in the permit, &c., and should immediately be delivered into the custody of the proper officer of revenue or customs there, and be duly warehoused in a duty-free warehouse, the bond should be void, or otherwise remain in full effect; that the Plaintiffs had deposited in a duty-free warehouse, in the city of *Cork*, duly approved, &c., certain spirits distilled by the Plaintiffs, without payment of duty thereon; and on the 19th of February, 1869, permits were duly granted for the removal of certain puncheons thereof from the same warehouse to the customs warehouse *Limerick*, being a place duly appointed, &c., for the warehousing of spirits without payment of duty, within a certain time; and thereupon and in consideration that the Plaintiffs would deliver to the Defendants, as carriers of goods for hire, the said puncheons to be by the Defendants carried from *Cork* to the said customs warehouse *Limerick*, according to the permission, &c., and subject to the terms specified in the said permits, and to be there delivered, for reward to the Defendants, the Defendants promised to carry

the said puncheons to the customs warehouse *Limerick*, and there deliver the same to the proper officer duly authorized to receive the same. The plaint then alleged the delivery to the Defendants for that purpose, and that all things were done to enable the Plaintiffs to maintain this action; and that the Defendants always had notice of the premises, yet that they did not deliver the whisky, &c., whereby the Plaintiffs had been compelled under their bond to pay the duty which if the whisky had been duly delivered at the customs warehouse *Limerick*, would have been paid by the Plaintiffs' customers.

There was a similar count in respect of each puncheon of whisky; and there were also counts in trover.

The Defendants, by their pleas, denied notice of the premises as alleged, and denied that the whisky was delivered on the terms alleged; and they pleaded that the whisky was delivered by the Plaintiffs to the Defendants, upon the terms that it should be carried by the Defendants from *Cork* to *Limerick*, and should be there delivered by the Defendant to certain persons, to wit, *J. Stein & Co.*, being the consignees thereof, at such place as was in the said several consignment notes of the said whisky respectively mentioned, or at such other place as the said consignees should elect; and they alleged that the consignees did elect to take the said several parcels of whisky at the Defendants' station in *Limerick* and that the Defendants did thereupon deliver the said parcels of whisky at the said station. Then followed a denial that the goods were the goods of the Plaintiffs, and that the Defendants had been guilty of converting the same.

The facts were these: The Plaintiffs were distillers in *Cork;* they were under the bond alleged in the declaration; they sold twenty puncheons of whisky to *J. Stein & Co.*, of *Limerick*, and these puncheons were delivered to the Defendants to be carried to that place. The delivery notes were all in the following form:—

"Delivered at the *Great Southern & Western Railway Co.* in good order.

"*Customs Warehouse, Limerick*, &c.

"One puncheon | Hds | Trs | Qr. casks | of whisky.

"For Messrs. *John Stein & Co., Limk. Station, Limerick.*

"*Cork Distilleries Co. (Limited).*"

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The receipt note was in this form:—

"*Cork*, 19 Day of Feby., 1869.

"From *Thomas Henry Hewitt & Co.*

"*Watercourse Distillery*—One puncheon

"Of whisky addressed to *Seymour's Customs*

"*Warehouse* at *Limerick.*

"For *John Stein & Co.*"

The *permit* which accompanied the puncheons was (so far as is material for this case) in the following form: "Permit *Hewitt & Co.*, distillers of *Cork*, to remove from duty free warehouse at *Watercourse*, &c., one cask of plain British spirits, on which duty has *not* been paid, containing, &c., to *Custom House* at *Limerick*. . . . . Conveyance, car and rail. . . . Bond in force." When the duty is paid the permit states the fact, and is accompanied by a card with the name and address of the purchaser.

The "Customs Warehouse" and "*Seymour's Customs Warehouse, Patrick Street Limerick*" are bonded or duty-free warehouses under the control of the Excise for the purpose of receiving and storing whisky on which duty has not been paid, and are situated at a distance of about half a mile from the railway station, which latter is just outside the town.

The Defendants did not deliver any of the puncheons at the customs warehouses, but *J. Stein & Co.* having applied for them at the railway station, they delivered the puncheons to *J. Stein & Co.* at that place.

Stein & Co. never paid any duty on the whisky, and the Plaintiffs were called on to do so under their bond, and paid duty to the amount of £1360 5*s*. It did not appear that any special communication was made to the Defendants as to these puncheons of whisky. But the Plaintiffs had been for a long time in the habit of sending whisky to houses in *Limerick* by the means of the Defendants' railway, in the manner above stated.

The Court was to be at liberty to draw inferences of fact.

The Court of Queen's Bench gave judgment for the Plaintiffs (1), but on error to the Exchequer Chamber that judgment was reversed (2). The case was then brought up to this House.

(1) Ir. Rep. 4 Com. Law, 349. (2) Ir. Rep. 5 Com. Law, 177.

The Judges were summoned, and Mr. Justice *Mellor*, Mr. Justice *Brett*, Mr. Justice *Quain*, Mr. Baron *Cleasby*, Mr. Justice *Grove*, and Mr. Baron *Amphlett*, attended.

Sir *J. Karslake*, Q.C., and Mr. *Cohen*, Q.C. (Mr. *Waters*, Q.C., and Mr. *W. M. Johnson*, both of the Irish Bar, were with them), for the Plaintiffs in Error :—

The duty of the carriers is properly alleged in the plaint. The contract with them was to carry the whisky to the bonded warehouse, and not elsewhere, and there are no circumstances in this case which justify the contention of the carriers that they were warranted in delivering the whisky to the consignees wherever the consignees thought fit to require it to be delivered. In all the delivery notes the place of delivery is mentioned as "Customs Warehouse *Limerick*," and all the receipts given by the carriers, acknowledging that they have received the whisky for carriage, are in the same form. The contract made by the carriers with the distillers was therefore perfectly plain, and was evidenced by the papers on both sides. And where *Stein & Co.* are mentioned, the form of expression used is not deliver *to Stein & Co.*, but *for Stein & Co.* This shewed that, though they might ultimately claim the whisky, it was in the meantime to be delivered at the particular place named. It was, therefore, a special contract to carry to the customs warehouse, and not elsewhere. The case states that the distillers had been for several years in the habit of sending whisky in this manner to *Limerick*, and therefore the carriers knew the practice and were not entitled to depart from it. That clearly supports the allegation of notice. They must have known, too, that the duty had not been paid, for the case states that "when the duty has been paid the cask is addressed to the customer, and his name and address are put on the card;" and if the duty had been paid in *Cork* the permit would have accompanied the address card, which would have contained the name and address of the purchaser, and the statement that the duty was paid. Here no address whatever was given, nor such statement made, and consequently the carriers had full notice of the fact. The names of *Stein & Co.* were introduced for the purpose of informing the customs' officers from whom they would receive payment of the

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duty, but did not constitute *Stein & Co.* the absolute consignees without reference to the duty. The consignee had no right to prevent the delivery at the customs warehouse, and thus defeat or delay the payment of the duty. If the duty has been paid, the permit states the fact, and when not paid it states that in express terms, and therefore it was impossible to doubt that the duty here had not been paid, and consequently that the proper place at which to deliver the whisky was the customs warehouse, to which the whisky was in express words addressed. And the practice, well known to the Defendants, was, that if the duty had not been paid the whisky went to the customs warehouse; if the duty had been paid, the whisky was addressed to, and went to, the customer. *Stein & Co.* were in fact acting contrary to law when they went to the station and intercepted the whisky on its way to the customs warehouse. The object of this contract was, not that the carriers should carry this whisky to the consignee in the ordinary sense of a contract merely for carriage, but that it should reach his possession through the authority and by the means of the customs warehouse. The contract here did not rest on one single document, but on several, and on the known course of business between the parties. That contract had been broken by the carriers, and they must be held liable to pay as damages the amount of the loss which their improper delivery of the whisky had occasioned.

Dutton v. *Solomonson* (1) was cited.

Mr. *Joseph Brown*, Q.C., and Mr. *Gerald Fitzgibbon*, Q.C. (of the Irish Bar), for the Defendants in Error:—

It is difficult to see on what fact in the case the argument that there was here any special contract for delivery at a fixed place can be founded. The places named are merely the places where the consignees may look for the goods, and to which the carriers, for the convenience of the consignees, are to carry them; but the naming of them does not exclude the right of the consignees to receive them at another place. The carriers had no right to refuse delivery to the consignees if the consignees paid the carriage. The contract was the ordinary one of a sale to a purchaser, and a

(1) 3 B. & P. 582.

consignment to him, and it fell, therefore, within the ordinary rule as stated by Lord *Kenyon* in *Dawes* v. *Peck* (1), that a delivery to a carrier for a purchaser was a delivery to the purchaser himself. The only duty of the carriers was to carry the goods safely, and to deliver them to the consignees. They had nothing to do with the payment of duty; and if *Stein & Co.* had improperly stopped the goods, they, and not the carriers, were answerable. The common liability of carriers could not be enlarged by anything which occurred between the buyer and the seller: *Horne* v. *The Midland Railway Company* (2). If that was to be done, it must be expressly shewn that the particular matter had been brought to the knowledge of the carriers and that they had assented to it. Nothing of that sort was shewn here. It was left as an ordinary contract for the carriage of goods. The *Limerick* customs station was mentioned as the place where the delivery might take place and the carriers be paid; but there was nothing to shew that the carriers might not, at the demand of the consignees, deliver the goods at any other place if they were paid for the carriage. The 10th paragraph of the case expressly stated that "the persons to whom the said puncheons of whisky were sold by the Plaintiffs, and who were liable to the Defendants for the payment of the carriage of the whisky, were *J. Stein & Co.*, of *Limerick*, who carry on the business of spirit merchants at *Limerick*, and are the Messrs. *J. Stein & Co.* named in the several consignments." Nothing could be plainer than this to shew that this was an ordinary case of sale and purchase, and an ordinary case of delivery by the seller to a carrier at the risk and for the benefit of the consignee, that consignee being expressly pointed out and described. If so, the ordinary rules applicable to such a case attached to this transaction: *Dunlop* v. *Lambert* (3). *Stein & Co.* were the consignees, and being so, were the masters of the contract; they were liable for the carriage, and had they given directions to change the place of delivery, and had those directions been disobeyed, they would have been entitled to recover damages for any loss thereby occasioned: *Scothorn* v. *The South Staffordshire*

(1) 8 T. R. 330.
(2) Law Rep. 7 C. P. 583.
(3) 6 Cl. & F. 600.

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Railway Company (1). The claim for damages to be paid by the carriers was altogether one of an exceptional kind, and yet it was founded upon a contract for carriage which was altogether one of an ordinary kind. Nothing was said to the carriers as to the bond, nor as to the liability of the Plaintiffs under it.

There was no pretence for charging a wrongful conversion here; the goods were the goods of the consignees, and were so described in all the documents, and the only bar to the right of possessing them was that of paying the cost of the carriage. That bar being removed by payment of the carriage, the consignees were entitled to the possession of the goods.

Mr. *Cohen* replied:—

Stein & Co. had no right of control over the goods until after they had arrived at the customs warehouse. They were to be taken thither *for Stein & Co.*, but were not sent for delivery *to Stein & Co*, and the long course of dealing between the parties gave sufficient information to the carriers that spirits expressly described as *not* having the duty paid upon them ought to be delivered at the customs warehouse, and not to a private person, although he might appear to be the consignee.

THE LORD CHANCELLOR (Lord *Cairns*):—

My Lords, in this case I submit to your Lordships that the proper question to be put to the learned Judges, whose assistance we have the advantage of to-day, is, whether under the circumstances stated in the special case, and having regard to the liberty reserved at the trial to draw all proper inferences from the matters stated in the case, the Defendants in Error are liable to the Plaintiffs in Error for having delivered the puncheons of whisky direct to *Stein & Co.*

The learned Judges retired for a short time. On their return

MR. JUSTICE MELLOR delivered their opinion:—

My Lords, in answer to the question put by your Lordships to the Judges, I am authorized to say that, having regard to the

(1) 8 Ex. 341.

inferences which ought to be drawn from the circumstances stated in the case, they are of opinion that the Defendants are not liable to an action by the Plaintiffs for having delivered the puncheons of whisky in question to Messrs. *Stein & Co.*

There is evidence in the present case that these goods were, with the consent or by the authority of the purchaser, consigned by the vendors, as consignors, to be carried by the Defendants as common carriers, to be delivered to the purchaser as consignee, and that the name of the consignee was made known to the Defendants at the time of the delivery. Under such circumstances the ordinary inference is that the contract of carriage is between the carrier and the consignee, the consignor being the agent for the consignee to make it.

It appears to us that there is evidence also that at the time of the delivery there was a specific mention that the freight was to be paid by the consignee. Under such circumstances the inference is almost irresistible that the contract for carriage in the present case was the ordinary contract for carriage at the cost and risk and under the control of the consignee.

We are far from saying that, under other evidence of facts, a special contract might not be inferred between the carrier and the consignor. It is unnecessary to determine whether, in the present case, if there had been evidence that the Plaintiffs had made known to the Defendants the circumstances under which, and the parties by whom, the excise bond was given, a jury might not have been justified in inferring that there was a special contract as to the carriage between the Defendants and the Plaintiffs. Such evidence is absent from the present case; and, therefore, it appears to us that there is no sufficient evidence of anything having passed between the Plaintiffs and the Defendants other than such as raises the inference that the only contract of carriage was the ordinary one between carrier and consignee. If that is so, it follows that the Plaintiffs cannot recover. Whether, as between the Defendants and the Excise, the Defendants were right or wrong in delivering the goods to *Stein & Co.* anywhere but at the customs warehouse in *Limerick*, it is clear that, as between the carriers and *Stein & Co.*, the carriers might well deliver them at any time or place at which *Stein & Co.* chose to demand to receive them.

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We, therefore, think that the Defendants are not liable to the Plaintiffs in respect of the delivery by the Defendants to *Stein & Co.* of the puncheons of whisky in question.

THE LORD CHANCELLOR :—

My Lords, I am sure that your Lordships are all very much indebted to the learned Judges for the immediate consideration which they have given to the case which your Lordships have heard argued, and for the very clear and distinct answer they have given to the question propounded by your Lordships.

My Lords, in the answer of the learned Judges to that question I must say that I entirely agree. It appears to me that if there has been a difficulty raised in this case, it has arisen from the somewhat obscure and vague and unprecise statements with which we have to deal in the special case. But, passing by any minute criticisms upon those statements, what I think your Lordships find clearly expressed in the special case is this; the *Cork Distilleries Company* and *Stein & Co.* appear from the case to have stood in the position of vendors and purchasers. The whisky in question was sold, and it must be assumed that it was in accordance with the orders of the purchasers that it was delivered to the railway company, as carriers, to be carried to *Limerick*. The carriage was to be paid by the purchasers, and notice was taken upon the occasion of receiving the goods for transit that it was to be so paid. If the case ended there, if there was nothing more to be considered, it would be one of the cases of the most ordinary occurrence possible. The property would have passed; the transit of the property would have been at the risk of the purchasers; the purchasers would have been the masters of the contract for conveyance, and it would have been for the purchasers to take delivery either at the place indicated at the time of the departure of the goods, or at any other place at which they afterwards preferred to receive the goods.

But, my Lords, there were beyond that, in this case, undoubtedly, special circumstances in the position of the vendors. The vendors, in order to obtain the permit necessary for the conveyance of the whisky in question without the duty being paid, were obliged to give a bond to the Customs, making themselves

responsible in a penal sum of money if the goods were not carried within the time indicated, and to the place specified in the permit. The case does not state whether that bond was given by the distilleries company of their own accord, or the request of *Stein & Co.*, or in pursuance of a course of business which would make it a matter of ordinary occurrence for all distillers in sending out goods to their customers without the duty being paid to enter into, on behalf of their customers, the bond necessary to effect the conveyance of the goods. My Lords, if I were to draw an inference upon that subject, I should say that it was absolutely impossible that persons in the position of *Stein & Co.* and the *Cork Distilleries Company*, from time to time, could have been ignorant that it was necessary that such a bond must be given in order to obtain permission for the transit of the goods. And therefore the bond would be given by the distilleries company really on behalf of *Stein & Co.;* and *Stein & Co.* would be responsible to the distilleries company if they did anything on their part to frustrate the fulfilment of the condition of that bond.

However, my Lords, that being the position of the *Distilleries Company*, I could quite understand a special contract being raised, under that state of circumstances, between the distilleries company and the railway company. I could quite understand the distilleries company either making a stipulation in this particular case, or making a general stipulation with the railway company, with regard to the conveyance of all their whiskies under permit, that the railway company must understand that the placing upon the whisky a destination to a customs or bonded warehouse was not to be treated as a mere indication of the address for the consignee, but that it must in all cases be taken as of the essence of the contract for conveyance, and that it must be understood that there was a special engagement by the railway company with the consignors, the distilleries company, that they would carry the goods to that place, and to no other place, and that they would be liable to the consignors if, by reason of departing from that particular mode of transit, any liability should fall upon the consignors under their bond. I say I could quite understand the distilleries company coming to the railway company and explaining that that was their position, and requiring them to make a

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contract of that kind specially with them as consignors—a contract which, as it appears to me, might be quite separate from the other contract of conveyance with the consignees. The two contracts might well co-exist together, the one making the railway company liable to the consignors according to the amount of interest which they had in the question of conveyance, and the other making the railway company liable to the consignees for the value of the goods conveyed.

But, my Lords, in order to the establishment of such a contract between the railway company and the distilleries company, I think your Lordships must be able to find that the position in which the distilleries company had placed themselves under their bond was actually and clearly made known to the railway company—that it was made known to the railway company not merely that the goods were passing under permit, but also that the bond, which had obtained the permit to pass the goods, had been given by the distilleries company, and that the tenor and condition of the bond were of the character I have described.

Now, my Lords, I must say that if those facts were made known to the railway company, nothing would have been easier than to have stated that upon the face of the case. And I observe, and your Lordships will observe, that the declaration setting out the bond goes on to aver in words which I am unable to treat as words of surplusage, or mere matters of course, that the railway company had notice of this bond. But there is not a word that I can find in the special case which states that the railway company had such notice, nor is there a statement that I can find in the special case from which I am able to draw the inference that the railway directors had such notice. And if they had not such notice, then it appears to me that the case returns into the condition in which I originally placed it before your Lordships, of a case without any special circumstances brought home to the knowledge of the carriers—a case in which there is merely a consignor and consignee, and goods delivered to be carried for the consignee, and therefore to be under his order with regard to the time and place of delivery.

My Lords, I therefore think that the judgment of the Court of Exchequer Chamber is correct; and that your Lordships will be

right in following the advice given to the House by the learned Judges, and dismissing the present appeal.

LORD CHELMSFORD entirely agreed with his noble and learned friend.

LORD HATHERLEY:—

My Lords, I have only to say that I am entirely of the same opinion. I think the reasons for our judgment have been sufficiently and amply stated, namely, that in the first place, according to the statements in the case, and according to the inferences we are invited to draw from those statements, the contract appears to me to have been made with the consignees through the agency of the consignors; and secondly, that with reference to the bond, although notice of the bond is averred in the pleadings, there is nothing in any way stated in the case, or that can be deduced from the case, shewing that such notice was given to the railway company. Upon those two grounds, either of which I apprehend would be amply sufficient to decide the case, I feel bound to concur in the conclusion arrived at by my noble and learned friends.

LORD O'HAGAN:—

My Lords, I entirely concur; and I will avoid making any observations upon the case, which has been so fully considered, and so well discussed, save to say this, that if one argument which was presented here to-day had not been presented here, as it was not presented in either of the Courts below, I should have felt very great doubt indeed upon the question. I should have said—putting out of the case altogether the question of illegality, as to which I do not think there is any doubt at all, and the question of property, which has been so largely discussed—if one looks merely to the probabilities of the case with regard to the interest of the consignors here in making a special contract, and the documents in the case which appear to indicate that it was intended to make a special contract, limiting the consignees' right of taking the goods at any place, and at any time they pleased, to a right to take them at the customs, at a particular place after their arrival there, and particularly considering the peculiar phraseology of the docu-

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ments—which dedicate the goods not "to" the person, but "for" the person—it would have been a very serious question indeed whether the judgment of the Court below should not have been reversed. However, I am of opinion that the judgment is right, having regard to the observations which fell last from my noble and learned friend on the woolsack, and the argument which has been presented so very forcibly to day, that the circumstance that the damages here are of a very exceptional character, and that the existence of this bond, and the consequential injury which might arise to the consignors, was not communicated to the railway company—manifestly upon the face of the documents there is nothing to shew that—though there is an allegation of notice in the pleadings, that allegation of notice is unproved. Upon that ground, my Lords, I am disposed to concur in affirming the judgment of the Court of Exchequer Chamber in *Ireland.*

LORD COLERIDGE:—

My Lords, I am of the same opinion. At one time I was under the impression that there was evidence in the case, from which such a state of things, as my noble and learned friend on the woolsack suggested, might not unreasonably be supposed to exist between the railway company and the *Cork Distilleries Company,* did exist in point of fact. If I could have found upon consideration that there was such evidence I should have been of a different opinion from that which I now express. But on consideration I can find no such evidence. I therefore concur with the rest of your Lordships in thinking that this judgment should be affirmed.

Judgment of the Court of Exchequer Chamber in Ireland affirmed.

Lords' Journals, 30th June, 1874.

Attorneys for the Plaintiffs in Error: *Henry Noblett & Son, Dublin; Dawes & Son.*

Attorneys for the Defendants in Error: *Barrington & Jeffers, Dublin; Young, Jackson, & Co.*

THE DIRECTORS, &c., OF THE GREAT WESTERN RAILWAY COMPANY . . . } PLAINTIFFS IN ERROR;

AND

JOHN MAY . . . . . } DEFENDANT IN ERROR.

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Railway—"Superfluous Land"—"Vested"—8 & 9 Vict. c. 18, s. 127.

The meaning of the phrase "superfluous land" in the 127th section of the *Lands Clauses Consolidation Act*, 1845 (8 & 9 Vict. c. 18) is, land acquired by the promoters of the undertaking, but not required for the purposes of the undertaking.

In the 127th section the word "required" does not mean *demanded*, but *necessary*, and when it ceases to be necessary, this land becomes superfluous land.

It may be so in any one of four ways: if more land had been taken than, on the execution of the works, appeared to be needed—if the company had been forced to take it by reason of not being able to obtain a part of any property without taking the rest—if taken for works then deemed to be required for permanent use, but which afterwards were found not to be required, and were therefore abandoned—or, if taken only for a temporary purpose, when that temporary purpose had been answered.

The conversion of it to other purposes than those of the undertaking is evidence of its being superfluous.

Though land acquired for the purposes of the undertaking has been actually used by the promoters, if that use is only one of a temporary nature, the land having satisfied that use, becomes superfluous land.

Where land cannot be shewn to be required for the purposes of the undertaking, it vests absolutely in the adjoining owner under the 127th section of the *Lands Clauses Consolidation Act*, 1845; having so become "vested" in the adjoining owners, it is not affected by the circumstance that a private Act, passed afterwards, though before it is claimed by an adjoining owner, extends the time within which the directors may dispose of the superfluous lands belonging to the company.

Lands were acquired by railway directors, as for the purposes of their undertaking, notices under the compulsory powers clauses being given as to all—but the valuation as to some was fixed by the statutory arbitrator, as to the rest settled by agreement between the directors and the landowners. At the end of ten years the purposes to which the directors had applied certain portions of the lands thus acquired had been answered, and the directors allowed persons to occupy these particular portions as garden grounds, still however retaining a right of re-entry thereon on very short

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notices. An adjoining owner claimed them under the 127th section of the *Lands Clauses Consolidation Act*, 1845 :—

Held, that his claim was valid, that they had become "superfluous land" and had "vested" in him, within the meaning of the section, and it had not been necessary for him to do any act to bring about that legal result.

EJECTMENT by *John May*, brought on the 10th of June, 1869, to recover a piece of land of about four acres, situate in the parish of *Basingstoke*, in the county of *Hants*. The facts were stated in a Special Case for the consideration of the Court of Queen's Bench, and in January, 1872, that Court gave judgment for the Plaintiff (1). The directors brought Error on the judgment, which was, however, affirmed in the Exchequer Chamber (2).

The *Berks and Hants Railway Act*, 1845, incorporated certain persons as a company for the purpose of making a railroad from *Reading* to *Newbury* and *Hungerford*, and a diverging line to join the *South-Western Railway* near *Basingstoke*. By sect. 34 the compulsory powers for purchasing land were not to be exercised after three years from the passing of the Act, and five years were given for the completion of the railroad. The powers given by the Act expired, therefore, on the 30th of June, 1850. By an Act passed on the 14th of May, 1846, all the powers, &c., granted to the *Berks and Hants Railway Company* vested in the *Great Western Railway Company*. The usual notices required in a case where directors intend to exercise compulsory powers of purchase, were given to Mrs. *May* (the mother of the present Defendant in Error), and two other persons, the then owners of the land in question.

On the 12th of May, 1847, the lands, divided into two portions, containing together about 15A. 0R. 33P., were conveyed to the Defendants (now the Plaintiffs in Error), their successors and assigns. The value of one portion had been fixed by an arbitrator under the statute; the value of the other and larger portion had (after the statutory notice was given), been settled by agreement between the parties. The whole value amounted to £2331 7*s*.

(1) Law Rep. 7 Q. B. 364.

(2) Law Rep. 8 Q. B. 26. The facts are stated in detail in the reports in the Court below, and in the first of them a coloured plan of the land is given.

The Defendants took possession, and on a portion thereof, containing about 5A. 23P., constructed, at the southern end of the field, a part of the railway and a station and other works connected with the railway. On the remainder of the field they deposited chalk and other "spoil" excavated near the place, the whole field having been purchased because the directors required at that time a place where such chalk and spoil could be deposited. The chalk and spoil remained there, forming in some places mounds which varied in depth from one to eight or nine feet. The Defendants allowed the station-master and other persons in their service, without any leases or written agreements, to occupy this portion of the field. These persons cultivated it, and obtained crops from it. On the northern and eastern part of the field a long and narrow slip of land containing about two acres had been left without being covered by the spoil, and never had been used for the railway until about 1869, when a part of it was converted into a coal siding. That part was excluded from the present claim. In 1868 the directors required the persons occupying and cultivating the other portion of the field as above described, to pay some small rents in respect of such occupation. The quantity of land in respect of which these rents were paid was 9A. 3R. 14P.; the number of persons was about fourteen, and the aggregate amount of such rent was £12 4*s.* 2*d.* There was one written agreement entered into by the Defendants with regard to a portion of the land, and by that agreement one *Charles Hewitt* became tenant thereof on the terms of accepting three months' notice to quit, and, in the event of the Defendants requiring any portion of the premises for the purposes of the railway or railway works, they were to be entitled to take possession thereof on giving twenty-eight days' notice. The land occupied by *Hewitt* amounted to between two and three acres, and formed part of that claimed by the Plaintiff *May*, who contended that under the 127th section of the *Lands Clauses Act* 1854 (1), the land covered with spoil had become for

(1) *Lands Clauses Consolidation Act*, 1845 (8 & 9 Vict. c. 18, s. 127): "And with respect to lands acquired by the promoters of the undertaking under the provisions of this or the special Act, or any Act incorporated therewith, but which shall not be *required* for the purposes thereof, be it enacted as

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the purposes of the railway "superfluous land," and that the right of pre-emption of the same had now vested in him as adjoining owner. The Defendants denied this contention, and disputed his right to claim the lands. The Case reserved to the Court the right to draw inferences of fact. In 1861 and 1868 two (private) Acts were passed extending the time for disposing of the superfluous land of the company (1).

The decisions in both Courts having been adverse to the Defendants, they brought up the case for Error to this House.

Mr. *Manisty*, Q.C., and Mr. *Thesiger*, Q.C. (Mr. *C. J. Mathew* was with them), for the Plaintiffs in Error:—

The first question is whether the land, the subject of this proceeding, is "superfluous land" within the meaning of the 127th section of the *Lands Clauses Consolidation Act*, 1845. If it is not, the judgment must be for the Plaintiffs in Error. The second question is whether, if it bears that character, there is any right in the Defendant in Error to claim it as vested in him by act of law, he having done nothing within a time limited for asserting

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follows: . . . Within the prescribed period, or if no period be prescribed, within ten years after the expiration of the time limited by the special Act for the completion of the works, the promoters of the undertaking shall absolutely sell and dispose of all such superfluous lands, and apply the purchase-money arising from such sales to the purposes of the special Act; and in default thereof all such superfluous lands remaining unsold at the expiration of such period shall thereupon vest in and become the property of the owners of the lands adjoining thereto, in proportion to the extent of their lands respectively adjoining the same."

(1) By a *Great Western Railway Act* (private), passed in August, 1861, it was (clause 41) declared that the period limited by the *Lands Clauses Act*, 1845, for the sale of superfluous land belonging to and vested in the company, "shall be and the same are hereby extended to the further period of seven years from the passing of this Act."

By another *Great Western Railway* Act, expressly passed in 1868, it was declared by clause 20 that the company may, notwithstanding anything to the contrary in the *Lands Clauses Consolidation Act*, 1845, or any Act relating to this company, "retain and hold any lands belonging to them in the parishes enumerated in the schedule to this Act" (of which *Basingstoke* was one) "which have not yet been applied to the purposes of the company, for the period of ten years," at the end of which period the lands were to be sold.

his title thereto. And thirdly, whether he has any title to make the claim as an adjoining owner. [LORD SELBORNE referred on the subject of this last question to *South-Western Railway Company* v. *Blackmore* (1).] That case depended rather on the 128th than on the 127th section of the statute, and therefore did not govern the present. There, too, the railway company had put up the land for sale as "surplus land," while here the directors had retained the land as their own property, and had never in any way shewn a disposition to part with it.

The land was certainly not superfluous land. It had been purchased for a necessary purpose of the undertaking, it had actually been used, and was still liable to be used for purposes connected therewith should the directors have to excavate other lands, or for the making of sidings, or station houses, or for anything of that kind. *Moody* v. *Corbett* (2) is distinguishable from the present case. There land had been purchased for the particular purpose of building a bridge. After the bridge was built, land was left for which the company had no use, and it was let out in the ordinary way and for purely agricultural purposes, while here it was only occupied by some of the directors' servants, who merely held it at the will of the directors, and could be dispossessed at once, and the only instance in which there was a letting by a written agreement, there was a special stipulation inserted therein by which possession could be resumed at twenty-eight days' notice. That fact shewed that it was still in the contemplation of the directors to use the land for the purposes of the undertaking. The deposit of spoil upon the land was a necessary purpose of the undertaking. Such spoil must be deposited somewhere, and, if removed from the land now claimed, the directors would have to acquire other land whereon it might be deposited. To impose on them the necessity to do this would certainly not be in accordance with the intention of the Legislature. The spoil deposited on the land was not the land itself, and if the Defendant in Error claimed the land and obtained it as vested in himself, he might require the removal of the spoil, which certainly could not be effected

(1) Law Rep. 4 H. L. 610.
(2) 5 B. & S. 859; 7 B. & S. 544; in error, Law Rep. 1 Q. B. 510.

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without other land being procured to be applied to the same purpose. If the land was required, as it was required, to be retained for this purpose it could not be described as superfluous land, but was land actually still in use. Again, having been actually used for the purposes of the undertaking it could not be treated as land taken without reference to such purpose, and therefore liable to revert to the adjoining owners. The property in it still continued in the railway company.

Then, again, the land could not be said to be vested in the Defendant in Error, for he was not compellable to take it. There had not been any devolution of it to him by act of law or by the act of himself or the directors. His liability to be compelled to take it must be identical with his right to demand it, for both alike depended on the phrase "vested." It had not "vested" in him. Now, if it had not vested in him, and vested before the Acts of 1861 and 1868 had passed, which Acts extended the time for the sale of the lands, the effect of those Acts was to deprive him of his right of making the claim. The word "vested" did not in the general Act mean absolutely vested in the ordinary sense of that term. The words of a statute, though sometimes peremptory in form, were not necessarily so in meaning. Thus, in *Roberts* v. *Davey* (1), though the words were that if mines were not worked within a certain time the lease of them should be "utterly void and of no effect," the meaning was held not to be unqualified, but that it was that the lease should be void at the will of the grantor, who was also required to shew his intention to treat it as void. So in *Malins* v. *Freeman* (2) a like construction was put upon the 17 Geo. 3, c. 50, where the words were, that if the purchaser at an auction did not pay the auction duty, the bidding should be "null and void to all intents and purposes." But it was held that a bidder who refused to pay the duty could not, in his own favour, make it void, and so rescind the contract, which could become void at the option of the seller alone. The words here only meant that after the sale, duly effected under the statute, the lands should vest in the purchaser.

The Plaintiff was not an adjoining owner. There was a portion

(1) 4 B. & Ad. 664. (2) 4 Bing. N. C. 395.

of the land belonging to the company, and within the limits of deviation, on the northern side of that which was covered with spoil, and that portion interposed between the land now claimed and Mr. *May's* property.

Again, the whole of the land had not been taken under the compulsory powers, but had formed the subject of agreement between the parties, the value being settled by themselves, without the statutory arbitration. In that respect it was not subject to the claim now put forward, for that related only to land taken under the compulsory powers.

Mr. *H. T. Cole*, Q.C., and Mr. *Pinder*, for the Defendant in Error:—

The land here had never absolutely and irrecoverably vested in the company, but only in a special manner, *sub modo*, namely, for the temporary purposes of the undertaking and the works thereof. When it was found that the railway and the works did not longer require the use of this land, the special and qualified property in it, given only for the purposes of the undertaking, ceased, the land became superfluous land, and the right of the adjoining owners to pre-emption became perfect. In the words of the section, it vested in them.

The object of the Legislature was clear. It was to give to the persons concerned in making a railway such land as was actually required for the purposes of the undertaking, but nothing more. It certainly was not to make them landowners and landlords. That was settled in *Beauchamp* v. *The Great Western Railway Company* (1), where it was held that the making of a road which the company was compellable to make, shewed that the land employed in making it was not superfluous land, but that otherwise it would have been so. And *Rangeley* v. *Midland Railway Company* (2) had previously decided that "for the purposes of the Act" must be taken to mean the permanent purposes, and the land taken must be land *bonâ fide* intended to be used for such purposes. Now here the Case itself stated that the land had been taken for the purpose of depositing on it spoil, which was a tem-

(1) Law Rep. 3 Ch. Ap. 745. (2) Law Rep. 3 Ch. Ap. 306.

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porary purpose only, and that purpose had been answered, and the land had now become needless for any purposes of the undertaking. Then there being no other use for the land, none to which it was to be put connected with the undertaking, it was clear that it was not retained for the permanent purposes of the company. At the end of ten years it therefore became, within the words of the statute, superfluous land, and the company was bound to dispose of it.

There was nothing in the argument that, having been once used by the company, the land became for ever vested in the company. If the directors obtained land, and on it built a station, no doubt that land would be land required and used for the purposes of the railway. But if, at the end of a few years, the directors determined to abandon that station, pulled down the house and left the land utterly unoccupied and bare, no one could pretend that, because it had once been used as the site of a station, it remained for ever the land of the company. Its use being entirely gone, it reverted, as the statute intended, to its original character, and must belong to the adjoining owners. Had it been known from the first that this land was merely to be used for the deposit of "spoil," which was soil taken from other land, and then let for garden purposes, an application could have been made to Chancery, and no doubt an injunction would have issued to prevent the Defendants from taking it under compulsory powers. *Eversfield* v. *The Mid-Sussex Railway Company* (1); *Dodd* v. *The Salisbury and Yeovil Railway Company* (2); and the principle had been recognised in the recent case of *Quinton* v. *The Corporation of Bristol* (3), where, acting upon *Galloway* v. *The Mayor and Corporation of London* (4), the distinction between a corporation with duties imposed upon it by Parliament to do certain public works, and a railway company, which for its own profit undertook to construct certain works, was expressly acted on.

The whole of the land had been taken under the compulsory powers of the company according to notices formally given, and

(1) 3 De G. & J. 286; 28 L. J. (Ch.) 107.
(2) 1 Giff. 158.
(3) Law Rep. 17 Eq. 524.
(4) Law Rep. 1 H. L. 34.

no part of it bore a different character merely because the value of that part had been settled by private agreement instead of being made the subject of statutory arbitration.

The land having by the force of the 127th section of the statute vested in the adjoining owners before the passing of the private Acts of the years 1861 and 1868, those Acts could have no effectual operation on it; they related only to land belonging to the company, and by force of the statute this land had ceased to belong to the company.

Mr. *Manisty*, in reply:—

The case of *Eversfield* v. *The Mid-Sussex Railway Company* (1) has no bearing on the present. That was a mere agreement to purchase the soil of a piece of land to make an embankment. Of course, when the embankment was made, the purpose of the purchase was accomplished, and the land itself belonged to the owners with whom the bargain had been made. The railway company, having no farther purpose for it connected with the railway, could not pretend to claim the right of it. So, again, *Dodd* v. *The Salisbury Railway Company* (2) is inapplicable here. There the company endeavoured to get possession of land, not for the purposes of the railway, but for a subsidiary purpose, that of constructing a road which would be convenient for the use of the company, and it was held that the compulsory powers in the company's Act could not be put in force. Here the use of the land was one directly connected with the construction of the railway, and there was no authority for saying that because that first purpose had been answered, though a farther use of the land for another purpose connected with the railway was likely to be required, the land could be treated as superfluous land.

THE LORD CHANCELLOR (Lord *Cairns*):—

My Lords, before I refer to the history of the land which is in question in this case, I will, in the first place, ask your Lordships' attention to the clause of the Act of Parliament upon which, by

(1) 3 D. & J. 286; 28 L. J. (Ch.) 107.

(2) 1 Giff. 158.

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the admissions of both sides, the question which your Lordships have to determine must turn. That clause is the 127th of the *Lands Clauses Consolidation Act*, 1845, taken in connection with the preface without a number by which that clause is immediately preceded. The words of the preface to the clause are these: "And with respect to lands acquired by the promoters of the undertaking, under the provisions of this or the special Act, or any Act incorporated therewith, but which shall not be required for the purposes thereof, be it enacted as follows." Then certain provisions are made, which I will afterwards refer to, with regard to selling the land which is thus described, and with regard to the vesting of that land in adjoining owners in case it is not sold.

The first question which your Lordships will have to consider upon this clause is, independently of the particular point of time at which the question has to be decided whether land is or is not superfluous, what is the meaning of "superfluous land" under those words which I have read? Now the synonym which is given in these words for "superfluous land" is this, "land acquired by the promoters of the undertaking," but "not required for the purposes thereof" under the provisions of the statute, or "of the special Act or any Act incorporated therewith," according as your Lordships may interpret the word "thereof" to refer either to the undertaking or to the special and incorporated Acts. My own opinion, my Lords, although I do not think it of very much importance for the question you have to determine, is that the word "thereof" refers to the undertaking, and that the meaning of superfluous land is, land acquired by the promoters of the undertaking, but not required for the purposes of the undertaking. Again, I say, postponing the question of the period of time at which the judgment has to be passed upon what is superfluous land, how is it that land becomes, within this definition, "superfluous land?" It appears to me that it may become "superfluous land" in one of four different ways. It may be, in the first place, land originally taken under the compulsory powers, but taken upon a wrong estimate or calculation of the quantity of land which would be required for a purpose for which it is afterwards

found out, by experience, that less land than was originally supposed will be sufficient. Or it may, in the second place, be land which, under the provisions of other clauses with which your Lordships are familiar, the railway company may have been forced to take by reason of wishing to take a part only of premises. There, *ex hypothesi*, that which the directors are forced to take is not land which in any sense they wish to take or want for the purposes of their undertaking—it is thrust upon them for the benefit of the landowners, and obviously is superfluous land. Or, in the third place, it may be land taken originally, and required originally, for the permanent works of the line, but which, in the course of subsequent years, turns out to have been occupied by works which are abandoned, and which, by reason of the abandonment of those works originally supposed to be permanent, becomes land no longer required by the company. Or it may, in the fourth place, be land which has been allowed to be taken by the company, or which has been forced to be taken by the company for temporary purposes, and which has been taken by the company with the intention originally of its being used only for temporary purposes, which temporary purposes have come to an end. At present I am not sure that there is any other kind of land which could be described as superfluous, but all those four classes of land are clearly superfluous land within that definition which I have mentioned, namely, land which was originally acquired for the purposes of the undertaking, but which is not required for the purposes of the undertaking.

My Lords, with regard to all these classes of land the policy of the Legislature clearly applies itself. The policy which dictated that 127th clause is obviously this: a railway company is armed with powers to take land from landowners against their will. The object to be attained is the effectuating of a great national enterprise. It is not part of that object, on the contrary, it is foreign and antagonistic to that object, to make railway companies landowners for the purpose merely of owning land. The object on the part of the Legislature rather is, to secure to the landowners from whom land is taken by compulsion, a reverting, as nearly as the Legislature can accomplish it, of all land which becomes useless

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or not wanted for the purpose of the national enterprise which has been sanctioned by Parliament.

Now, my Lords, those being the classes which occur to my mind as all the classes into which superfluous land should be divided, the next question which your Lordships have to consider is, what is the time, under this Act of Parliament, for ascertaining whether land is or is not superfluous within the meaning of the definition. Now there, again, I think your Lordships will find it convenient to bear in mind what I have termed the policy of the Act of Parliament. No doubt it would be part of the policy, and consistent with that policy, for Parliament to accompany and to watch over a railway during the whole of its existence, and from time to time, not only during the first ten years of its existence but during its whole life, to take care that whenever any land became unwanted for the purpose of the railway, that land should be taken from railway companies, either by forcing them to sell it, or by providing for its return to its original owner. But practically that is a course which could hardly be adopted. It would be impossible practically to make any legislative provision which should hang about a railway in this manner for the whole of its existence. Therefore, what it appears to me, and what I submit to your Lordships, Parliament has done is this: it aims at no such impossible result as I have described, but it takes, as that which will conveniently and easily accomplish its end, a period either of ten years, or of a few years more or of a few years less, dating from the creation of the parliamentary powers; and it appoints that epoch or that crisis as the point of time at which a survey should be taken of the then position of the railway company, and of its works, for the purpose of determining what land is at that moment superfluous. And then it appears to me—I will read the clause, and your Lordships shall judge if the conclusion is a legitimate one—it appears to me that the problem which has in every case to be solved is this; can you at that moment of time thus indicated by Parliament predicate of any land in the occupation of a railway company that it is at that moment "superfluous land" within those definitions of the term "superfluous land" which I have mentioned. If it is "superfluous land" within those definitions, then if the railway company

does not sell it at the moment, or has not already taken steps to have it sold, the provision of the Act of Parliament for vesting it in the adjoining owner intervenes. If you can predicate of it at that moment that it is land required—that is, then required—for the purposes of the undertaking, the railway company has a right to retain it, and Parliament no longer exercises any control, beyond fixing that point of time, over its destiny.

Why is it that I place the point of time where I have placed it, at the expiration of ten years, or whatever other period is prescribed by the Act of Parliament? The words of the 127th section are these: "Within the prescribed period, or, if no period be prescribed, within ten years after the expiration of the time limited by the special Act for the completion of the works, the promoters of the undertaking shall absolutely sell and dispose of all such superfluous lands, and apply the purchase-money arising from the sale to the purposes of the special Act, and in default thereof all such superfluous land remaining unsold at the expiration of such period shall thereupon"—which I take to mean on the occurrence of that point of time taking place, and finding the land not required for the purpose of the company—"vest in and become the property of the owners of land adjoining thereto in proportion to the extent of their lands respectively adjoining the same." There may be cases, indeed cases have occurred, in which short of the period of ten years, or whatever other period may be prescribed, questions may arise as to the disposition of superfluous lands, and the railway company may, short of the ten years, pronounce of their own accord land to be superfluous, and proceed to sell it, or proceed to appropriate it in some other way; and then the adjacent landowners may have rights upon that step being taken by the railway company; and they may assert those rights, as they appear to have done in some cases (1) that were cited at your Lordships' Bar. But, supposing nothing of that kind occurs, the clause contemplates the expiration of the ten years as the point of time at which the ultimate decision is to be made, and then all lands with regard to which, judging of the question of fact, you can predicate that

(1) See *London and South-Western Railway Company* v. *Blackmore*, Law Rep. 4 H. L. 610.

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they are at that moment superfluous, and not required for the purpose of the undertaking, are to vest in the adjoining landowners.

That being so, let me ask your Lordships' attention to the history of the land in question in this case, which appears to me to be a very short one. It was land scheduled to the Act of Parliament. Notices were given by the directors in the ordinary form to take it as scheduled land, under their compulsory powers, for the purposes of the Act of Parliament. It is quite possible (I do not think it necessary to give any opinion upon the point) that upon those notices having been given, the landowner might have come forward in the attitude of opposition, and might have said to the railway company, "You do not want this land; at all events, you do not want the whole of it for any permanent purpose. You are taking it really for a temporary purpose, namely, for a spoil-bank. I prefer that you should not purchase it out and out, but that you should use it in that temporary way, under the other clauses of the Act of Parliament, and compensate me for that temporary occupation." But when a landowner is served with a notice, he is not supposed to know, and is not bound to know, what the particular purpose, out of all their purposes, is that for which the railway directors are going to use the land. He sees that it is scheduled land; they tell him that they want it for the purposes of their Act, and, whatever his rights might be if he were informed of the whole of the case, being dealt with in the way he actually is dealt with, he has a right to say that the land has been taken from him by compulsion for purposes at the time represented to him to be the permanent purposes of the railway company.

It was in this way that the land was acquired by the company. In point of fact, so far as I can understand the statements in this case, it never was acquired by the company, and never was intended by the company to be acquired, as to the whole of it, for any permanent purpose. I find no indication in the statement of the Case which would lead me to suppose that, even at the original acquisition of the land, the directors supposed that they would require the whole of it for the purposes of their line. I believe, at least that

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is the inference which I draw from the statements in the Case, that even at the outset they thought that, at all events as to a large part of it, it would only be required for the purposes of covering it with spoil. But whatsoever their original intention or expectation may have been, beyond all doubt the land, by which I mean that part of it which is now in question, never was used for what I may term any permanent purpose connected with the line. It was used for the temporary purpose, and only for the temporary purpose, of depositing spoil upon it. At the end of the ten years, for that is the point of time to which I have to direct your Lordships' attention, it was found as a plot of ground upon which spoil had been deposited, but upon which spoil had ceased any longer to be deposited, and there it lay, as a piece of ground useless and unprofitable, having served the purpose for which it was taken, but having no longer, according to this case, any purpose to serve in connection with the railway.

Now, my Lords, if in that state of things the railway directors had been able to aver, and to prove, that although at that moment of time, and for some time before, it had ceased to be used even for the temporary purpose of depositing spoil, still there were purposes of the undertaking for which it might afterwards come into use, for which it was afterwards intended to be used; or if they had been able to say with regard to the depositing of spoil, that that was a work which might continue, or that there was what I may term the correlative work to the depositing of spoil, namely, the carrying away of ballast, the supply of ballasting to be made by means of the spoil, or out of the spoil so deposited—if they had been able to say that there was that object remaining unsatisfied, and that there was that object in their view for which they expected and desired to retain this land—I am far from saying that the company might not upon that footing have justified the retention of the land. I do not think it at all necessary to deny that. But, my Lords, I have read this Case from beginning to end, and I cannot find a sentence or a word in it which it would lead me to suppose that the railway directors had such an object in their minds, or desired to represent in the contention in this case, that they had such an object before them. The Case is absolutely silent

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upon the subject, and the inference, and I think the only inference, your Lordships can draw from the statements in the Case is, that at the expiration of the ten years all purposes connected with this land had been satisfied, and it lay then, as I have already said, a useless, unprofitable, objectless piece of land in connection with the railway company.

Then, my Lords, if that be so, what is the result? At the end of the ten years the clause of the Act of Parliament steps in, and, as I read it, takes possession of all land which at that time is in the position I have described, and vests that land in the owner of the adjoining land. It appears to me that that operation of vesting does not depend in any way upon the consent or the acceptance of the owner of the adjoining land. It is an absolute, complete parliamentary vesting of the land. Those cases, founded chiefly upon the old doctrine of entry for condition broken, or upon the covenants in leases introduced for the benefit of the lessor, in which it has been held that words which apparently would make the grant or the lease void, are to be made effectual by some farther act, indicating that the person entitled to take advantage of the condition desires to take advantage of it, have, in my mind, no bearing whatever upon the present case. This is a question of vesting or not vesting, which is to depend upon the determination of another question, which is a question of fact. If that question of fact is determined against the railway company, the vesting takes place, and no person has any power whatever to prevent it.

My Lords, it appears to me that the question of fact at the end of the ten years must be determined against the railway company, and that being determined against the railway company, it appears to me that the vesting took place, and if it did take place, the later Acts of Parliament extending the time during which the railway company is obliged to dispose of superfluous land have no application, for the time is only extended with regard to land which after the expiration of the ten years was found in the ownership and possession of the railway company. If I am right in the observations I have made, this land was not at that time in the ownership of the railway company.

The conclusion, therefore, at which I arrive, and which I submit to your Lordships, is, that the judgment of the Court below is correct, and that the judgment of the Exchequer Chamber ought to be affirmed.

LORD CHELMSFORD:—

My Lords, I agree with my noble and learned friend in every respect, and, therefore, it will be unnecessary for me to do more than to state very shortly the conclusions at which I have arrived.

In the first place, I think, upon the facts of the special case, that the lands at the end of the ten years not being required for the permanent purposes of the undertaking, they became superfluous lands, notwithstanding the employment of them for the deposit of spoil, which was a temporary purpose only. Secondly, I think that at the end of the ten years the lands immediately became vested in the Respondent as the owner of the adjoining lands, without any act being necessary indicating his acceptance of them. And thirdly, I think that, having so vested at the end of the ten years, which expired on the 30th of June, 1860, the Act of 1861, extending the time for the sale of superfluous lands belonging to the company, did not apply, as the land had ceased to belong to the company. It was not an extension of the term of ten years which had expired, but a creation of a new period of seven years.

I am therefore of opinion that the judgment of the Exchequer Chamber ought to be affirmed.

LORD HATHERLEY:—

My Lords, I take entirely the same view of the construction of this section, upon which the whole of the case before us depends. I think it would be impossible to apply that section to the case of lands which either have never been wanted at all for the purposes of the railway, and have therefore been improperly acquired, or to the case of lands which having been taken for the purposes of the company have, from some change of mind or purpose on the part of the railway directors, either been for a time used for the

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purposes of the company, but afterwards appear not to be so required, or have never been used for any such purpose of the company. In the first place, it is not likely that such a limitation would be in the contemplation of the Legislature in reference to lands improperly taken, and not wanted for the purposes of the company, because, to suppose that such a limitation was intended would be to suppose that the Legislature was providing for those cases in which the Act had been abused, and yet not stating its provision in any precise terms, but leaving it in general terms as we find it here in the Act, an enactment with respect to all lands acquired under the provisions of the Act. I should say that attention would have been immediately directed to the lands which had been acquired under the provisions of the Act, because it was thought that they might be required, and it was expected that they would be required for the purposes of the undertaking, but which, as experience afterwards shews, were not necessary for that purpose.

The Act seems to have been very strict in this respect. The Legislature seems to have enacted this particular clause rather as a means of effectuating the object which it appears to have had in view, of not leaving any lands in the possession of companies which were not wanted for the purpose of their works, than with any direct view to the benefit of the owner whose lands might have been so improperly acquired. For that purpose they vest this property, not in the persons who sold the land, not in the persons who might at first sight appear to be those entitled to require a reconveyance of it, but in order evidently to enforce upon the company the sale and disposition of their lands which they did not require, and in order to compel them under no circumstances to retain possession of that land which was not wanted for the purposes for which the Legislature gave it. On that account they enacted two provisions, by the one of which they enabled the company to sell all superfluous lands, and by the other of which they said, If you do not do that which we require to be done, if you omit or neglect to sell that land which you no longer want, then we will have this somewhat singular mode of coercing you and punishing you for not having so done, and of course at the

same time of expediting your movements with respect to the disposition of the land which you do not want, namely, "vesting" it, as it is here expressed, in the persons who own the adjacent land according to their respective rights in regard to the land so adjoining the railway. The clause itself is a very singular one, no doubt. A good deal of argument has been addressed to us by Mr. *Manisty* with respect to the word "vesting;" and the consequences of holding that which we do hold, that the lands do vest in the adjoining owners.

Having disposed of the first and principal point in the case, namely, as to how lands which are not wanted at the end of the ten years are to be disposed of, I will say no more with regard to the time than this—that there seems to be nothing unreasonable in that time which is given, namely, ten years, as a proper and adequate time for the company to ascertain whether it wants land or not. We do not find in the Act such words as "lands which they originally required," or "which they improperly acquired," or the like, but the question rather is, whether they shall be required at that time when you shall come to consider whether they are required. Looking at the words we find in the Act I have no doubt that the intention of the Legislature was to take a survey of the property of the company, and the circumstances of the employment, and the mode of the employment, of the property of the company at the end of that particular period, and to say then an entire clearance must be made of all those lands which shall not then be wanted.

Now, as regards the facts of this case, there can be no doubt, upon the case as stated, that these lands were not, at the end of the ten years, required for the purposes of the railway company. They had been used for the purpose of making a spoil bank and depositing and throwing upon that land the spoil which the railway company had taken from their cuttings and tunnels. Even if you kept to the very terms of the Act, as has been justly observed, you would be led to expect that that would be considered a temporary purpose, for it is one of the temporary purposes that are expressly mentioned in the *Lands Clauses Act*, in those clauses which follow clause 30. But, as was observed in the Court below,

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what purpose can be suggested for which this spoil bank might be wanted? It is not easy to suggest a purpose for which this spoil bank might be required after once the spoil had been deposited upon it. However, it is not necessary for us to enter into that question. I agree with the learned Judges of the Court below, that if a reasonable purpose of the railway could be suggested for which the use of this land covered with spoil would be required at some reasonably short distance of time from the period when you are investigating what is being done, namely, at the end of the ten years, if the company said, We shall want it this next year in order to take away as ballast, or for any such purpose—I am not specifying ballast, but, independently of that, if it could be shewn that it was wanted for the purpose of a brickfield, or for the purpose of obtaining materials for future repairs of the railway, or the like, if there was any reasonable expectation of its being required for any such purpose, we should have had that stated in the Case. We have nothing of the kind stated in the Case; therefore it is unnecessary for us to form a judgment as to whether it might or might not be wanted for the purposes of the line, purposes which would render legitimate the retention of the land. We are not obliged to consider that. It has been used for depositing spoil; it has performed its duty, and if nothing more is to be done with it at the end of ten years, it appears to me to be clearly land which is not required for the purpose of the railway.

2 QBD 343.

My Lords, I have said that the mode of compelling a railway company to dispose of land seems a singular one in many respects. Observations have been made, some of them very just observations, by Mr. *Manisty*, as to the inconvenience which might arise in consequence of the land being so vested in the adjoining landowners. But so it is vested—that is, the mode of vesting prescribed by the Act of Parliament distinctly, and I do not know that the inconvenience is greater that it would be under a demise or a conveyance by which land is vested in a person without some intimation from him of his being willing to receive it. It is not for me to say that that is convenient or inconvenient. I might suggest a number of strange consequences which might arise from the peculiar course which is directed by the Act of Parlia-

ment. There might have been some questions of this kind arising: A contest might arise in some cases as to who is an owner of land adjoining a railway? The question might also arise: Is every part of the property of a man who is an owner of land adjoining a railway to entitle him to a share, or only the particular part immediately adjoining the railway, and not any part which, after you have passed the hedge or other boundary of the railway, is behind a farther hedge? Or the questions might arise: What is to be done with regard to infants? What is to be done with regard to married women? and the like. And what is to be done with regard to partition between the several parties who are interested? All that the Legislature has entirely passed by; but this determination, at least, they seem to have come to, whoever takes it, and whatever difficulty there may be as to who takes it, we are resolved that you, the company, shall not hold it, and if at the end of the ten years you have been ill-advised enough not to have disposed of it—if we find it in your hands—we will take it out of your hands and put it into the hands of others, leaving it to the decision of the proper tribunals to say who those others shall be; but if you are well advised you will dispose of it in order to prevent its vesting in an adjoining owner, as I apprehend that the land has vested in this case.

LORD SELBORNE:—

My Lords, I am entirely of the same opinion.

In the preamble to this 127th clause the word "required" is clearly used in the sense not of demanded, but of necessary; and the words, "shall not be required," are not only future in form, which, perhaps, is of little consequence, but they introduce provisions intended to operate at, or before, a fixed future time. Therefore the question of fact, whether the land is necessary for any purpose of the undertaking or not, unless sooner decided by the directors for themselves, must be determined at that time, and the whole policy of the provisions evidently points to the same conclusion.

Now the rule, my Lords, which your Lordships will lay down, will operate in some cases in favour of the company and in

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others against them. It will operate in favour of the company if land not originally required for any purpose of the undertaking, as for example, to take one of the classes pointed out by my noble and learned friend on the woolsack, land which the directors were forced to purchase against their will, if such land has afterwards, before the end of the ten years, been actually applied to, or become *bonâ fide* wanted for, some purpose of the undertaking; in that case the rule will operate in the company's favour. On the other hand, it will operate against the company if the land which has been at some time temporarily used or wanted for some purpose of the undertaking—whether that purpose was originally contemplated as temporary or as permanent—has before the end of the ten years ceased to be *bonâ fide* used or wanted either for that or for any other purpose of the undertaking. Upon the whole, my Lords, I think that while the rule is one which will carry into effect the policy of the statute, and is fairly derivable from the words, it is as convenient a rule, both for the landowners and for a company, as any other which has been suggested in the course of the argument.

Judgment of the Court of Exchequer affirmed.

Lords' Journals, 26th June, 1874.

Attorneys for the Plaintiffs in Error: Messrs. *Young, Maples, Teesdale, & Nelson.*

Attorneys for Defendant in Error: Messrs. *Johnson & Weatheralls.*

IN COMMITTEE FOR PRIVILEGES.

1874
July 7.

THE MONTACUTE AND MONTHERMER PEERAGES.

Peerage—Attainder—Restitution in Blood of Heirs of an attainted Person.

An attainder was pronounced, in 1538–9, against *Margaret P.* and against her son *Henry P.* He was beheaded in that year. She was for a time spared. She united in her own person three baronies, described as having been created by writs of summons and sittings—*Montacute* (1299), *Monthermer* (1309), and *Montacute* (second of that name, 1357). By the ordinary course of descent *Henry P.* would have succeeded to these baronies had he survived his mother. He had himself sat in Parliament under the title of *Henry P.*, Lord *Montague*, and was so described in the Inquisition taken after his execution in 1539. The attainder against his mother was, by *Henry* VIII., put in force in 1541, when she was beheaded. In 1553 an Act of Parliament was passed (1 Mary, sess. 2, c. 1), intituled, "An Act for the Restitution in Blood of the Heirs of *Henry Pole*, late Lord *Mountague*." The Act, a private Act, was in the form of a petition to the Queen from the two ladies *Katherine* and *Winifred*, the only children of *Henry P.* It recited his attainder, and prayed that they and their heirs might be restored and enabled *onely* in blood as daughters and heirs of *Henry*, &c., and enabled to demand, ask, have, hold, and enjoy all such honours, castles, manors, lordships, &c., and all other manner of hereditaments, &c. which at any time shall come, remain, descend, or revert from any lineal or collateral ancestor of "your said subjects," &c., "other than such castles, manors, lordships, &c., which were of the said *Henry P.* in possession, reversion, remainder, or otherwise," at the day of his attainder. *Margaret P.* was not mentioned in the Act:—

Held, that this Act had no effect on the attainder of *Margaret*, which still remained in full force. It only entitled the two ladies and their heirs to claim inheritances which they might derive from persons as against whose succession the attainder of *Henry Pole* himself would have been an obstacle. There was, therefore, no succession to the first three peerages, which must be traced through *Margaret:*

Held, also, that it was, at least, highly probable that the barony of *Montague*, by which title *Henry P.* had sat in Parliament, was (with a mere change of the spelling of the name) one of those held by his mother, and for which he had received a writ of summons in her lifetime; and that the Act 1 Mary, which was not a reversal of his attainder, but only an Act for the restitution in blood of his heirs, had no effect on the barony in respect of which he had sat in Parliament.

Per THE LORD CHANCELLOR (Lord *Cairns*) and LORD HATHERLEY:—The fact that a son was sitting in Parliament by writ of summons in virtue of a barony belonging to a parent, would not, if that parent was attainted, save that barony from the consequences of that attainder.

THE Right Hon. *Edith Maud*, Countess of *Loudoun* in the peerage

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of *Scotland*, and Baroness *Botreaux*, *Hungerford*, *De Moleyns*, and *Hastings* in the peerage of *England*, presented a petition to Her Majesty praying that she might be declared the senior co-heiress to the baronies of *Montacute* (1299), *Monthermer* (1309), *Montacute* (1357), and *Montague* (1529), all of them in the peerage of *England*.

The petition was referred in the usual manner to the Attorney-General, on whose report it was, by Her Majesty, referred to the House of Lords. The petition alleged that these baronies became united in the person of *John*, the second Lord *Montacute*, of 1357, on his succession as third Earl of *Salisbury*, and that they afterwards devolved upon *Margaret*, Countess of *Salisbury*, the sister and heir of *Edward Plantagenet*, Earl of *Warwick* and *Salisbury*, who was the nephew of King *Edward* IV.; that *Margaret* married Sir *Richard Pole*, K.G., and their eldest son and heir *Henry Pole* was also (in his mother's lifetime, 1529–1536) summoned to Parliament as Baron *Montague*, and took his seat accordingly; that he died in his mother's lifetime, and, at her death, the Barony of *Montague* fell into abeyance between his daughters (his only children) *Katherine* and *Winifred*, upon whom, at their grandmother's death in 1541, the said before three mentioned baronies—*Montacute* (1299), *Monthermer* (1309), and *Montacute* (1357)—also fell into abeyance.

In the 30 Hen. 8 (1539) *Henry*, Lord *Montague* (spelt *Montegue* in some old documents of the day) had been attainted of high treason and beheaded (1); his mother had been attainted at the same time, but she was not beheaded until 1541. *Katherine*, the elder

Post 314.

(1) On this event he was described as "*Henricus Pole, nuper de Bukemer*, in Com. Buk.: *Miles, Dominus Montacute, alias dictus Henricus Dominus Montacute.*" In the Act subsequently passed (1 Mary) he is called "*Henrye*, late Lord *Montague.*"

According to *Beatson* (Political Index, vol. i. p. 58, A.D. 1504 (*temp.* Hen. VII.), No. 783), *Henry Pole* was then made "Lord *Montague* of *Montague*, in *Somersetshire*. Attainted and beheaded in 1538."

According to the same author, in the year 1513 (*temp.* Hen. VIII.), No. 794, "*Margaret Plantagenet*, daughter of *George* Duke of *Clarence*, and wife of Sir *Richard Pole*, Knt., was made Countess of *Salisbury*. Attainted and beheaded 1541."

Hume (Hist. of Eng. c. 31), says that *Henry de Pole* was made "Lord *Montacute*," and in speaking of his execution (c. 32), gives the same form of name.

daughter of *Henry Pole*, married *Francis*, Earl of *Huntingdon*, and *Winifred*, the younger daughter, married Sir *Thomas Hastings*, his brother. This Sir *Thomas Hastings* died without children, and she married for a second husband Sir *Thomas Barrington*, from which marriage other persons claiming as co-heirs were descended. These claimants were Mr. *William Selby Lowndes*, of *Whaddon*, and Mr. *William Lowndes*, of *Chesham*.

For the purposes of this case it may be assumed that the descent of the claimant from *Henry Pole*, Lord *Montague*, was established; and her contention was, that the peerages of *Montacute*, *Monthermer*, and *Montacute* had come to her from *Margaret Pole* (on whose death they fell into abeyance) coming through *Henry Pole;* and that the peerage of *Montague* which *Henry Pole* held, and by the name of which he had been summoned to the House of Lords in his mother's lifetime, was a new creation made in his favour; and that his daughters having been restored in blood by the Act of the 1 Mary (1553), sess. 2, c. 4, all these peerages had now descended upon the claimant (1).

The question on which the claim depended resolved itself into the construction of this Act of Parliament.

The Countess of *Loudoun* died on the 23th of January, 1874, and the claim had been renewed by her son, the present Earl of *Loudoun*.

Mr. *Henry Fox Bristowe*, Q.C., and Mr. *J. H. Hodgson*, appeared in support of the claim.

The Attorney-General (Sir *R. Baggallay*) (with whom was Mr. *Charles Clark*, Q.C.), appeared for the Crown.

By permission of the Committee the evidence which had been given on a former occasion on the claims of Mr. *William Selby Lowndes* and Mr. *William Lowndes* (as heirs of *Winifred Pole*) was treated as given now, and some farther evidence connecting the present Earl of *Loudoun* with the descent then proved was put in.

(1) The title of the Act on the Rolls of Parliament was "An Act for the Restitution in Blood of the Heirs of *Henry Pole*, late Lord *Mountague*." The material words of the Act are fully stated in the judgment of the Lord Chancellor.

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The Act of 1 Mary, sess. 2, c. 4, was also put in evidence.

Mr. *Bristowe* was then heard, as on a summing-up in support of the claim :—

The Barony of *Montague* (1529) was a new barony, for that was the form of the title, and not *Montacute,* which was a title that would have descended to *Henry Pole* from his mother. There was a summons in the name of *Montague* in the year 1536, and there was a sitting under that name in that year. There were subsequent sittings under the same form of title. The summons and the sitting would constitute a new barony. The other peerages came under it to *Henry Pole* by virtue of his mother's possession of them, but that was a new creation. He was attainted and beheaded, and so his title to any and all of these peerages would have been forfeited, but in 1553 his daughters and heirs were, by Act of Parliament, entirely restored in blood. It was intended for the benefit of the daughters as well with respect to *Margaret's* as to *Henry's* attainder. The word *onely* meant entirely. The Act was not a simple reversal of the attainder, but was a full restoration of them in blood, giving the two daughters the right to claim all that might have been possessed by their father in "reversion, remainder, or otherwise," and through "lineal or collateral descent," had he survived his mother, and not been attainted. The Act was a restoration to his blood of all that *Henry* had or might have possessed. Then what had he possessed? Clearly the Barony of *Montague,* for that had been created in his favour, and to the others he was entitled as lineal heir. The Act of 1 Mary was an act of mercy, and must therefore be liberally construed. There could be no doubt as to the favour the Crown intended to confer; it was in all probability the anxious wish of Queen *Mary* to atone to this family for all past sufferings, and to shew the royal mercy and goodwill in the most marked and especial manner. The extensive and forcible expressions in the Act proved that the favour of the Crown was meant to be a complete restitution to these heirs of all that their father would have possessed had he never been attainted. Its evident object could not otherwise have been secured.

The Attorney-General was not called on to address their Lordships.

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THE LORD CHANCELLOR (Lord *Cairns*):—

My Lords, although in point of form, the evidence in this case has not been completely perfected, and although the evidence put in to-day has not been printed for your Lordships' consideration, yet the case has assumed an aspect, in reference to the point which has just now been argued at the Bar by the learned counsel, which I cannot but think will enable your Lordships to dispose of it altogether without any minute examination of the evidence to which I have referred. And for the purpose of the few observations I have to make, I will, as the more convenient course, assume that the pedigree asserted by the claimant has been established by the evidence which has been adduced to-day, in addition to that which was adduced upon the former petitions. (Those of the Messrs. *Lowndes*.) I will assume that in favour of the petitioner.

But now, my Lords, arises the question, What is the effect, (with regard to the four peerages which are now claimed,) of the attainder of *Margaret Plantagenet*, Countess of *Salisbury*, who was attainted in the year 1539, and beheaded in the month of May, 1541? For the purpose of the observations which I have to make, I will consider the first three peerages separately, namely, the *Monthermer* peerage and the two *Montacute* peerages, which are claimed, and which are said to have been created in the years 1299–1309, and 1357 respectively; and I will reserve, as a separate matter, any observations which I have to make upon the fourth peerage which is claimed, namely, the *Montague* peerage.

Assuming that these first three peerages, namely, the two *Montacute* peerages and the *Monthermer* peerage came, and are properly traced to, *Margaret Plantagenet*, Countess of *Salisbury*, what, I say, is the effect of her attainder in 1539 upon those peerages? Clearly, my Lords, so long as that attainder remains unreversed, and so long as there are no enactments of Parliament doing away with the consequences of that attainder, the succession to those peerages is entirely cut off, and it is absolutely impossible for any person at the present day to claim any one of them.

That, my Lords, is admitted at the Bar, but the effect of the attainder is endeavoured to be got rid of by an Act of Parliament, which was passed in the first year of Queen *Mary*, in the year 1553.

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Now that Act, in point of form and in point of expression, is not in terms a reversal of the attainder to which I have referred. It professes to be, and is intituled, an Act "fully restoring in blood the heirs of *Henry Pole*, late Lord *Mountague*." And, my Lords, bearing in mind the circumstances that *Margaret* was attainted in the year 1539 and beheaded in 1541, and that *Henry Pole*, Lord *Montague*, who was mentioned in the title to this Act, and who was her only son, was attainted in the same year as his mother, namely, 1539, but was beheaded in that same year, so that his mother survived him, the first observation which I have to call your Lordships' attention to is this: If it was the intention of the framers of this Act of Parliament, and of the Crown, at that time, to reverse the attainder of *Margaret*, Countess of *Salisbury*, it is remarkable, and I must add also, unaccountable, that the Act of Parliament itself, upon the face of it, is completely silent with regard to *Margaret*; it does not mention her attainder; it does not mention her; it does not mention any corruption of blood which had occurred in her person. If it was the intention of the Crown and of Parliament to do away with that attainder, and to extend to the descendants of *Margaret* the advantage and the consolation of having this attainder put an end to, it is, I say, altogether unaccountable that the Act of Parliament upon the face of it is perfectly silent as to *Margaret*.

But my Lords, when we come to consider the Act of Parliament, your Lordships will find that it is extremely guarded, even as regards the person whom it does mention, namely, *Henry Pole*, whom it styles "late Lord *Mountague*." Nothing would have been easier, if it had been so intended, than to say in a very few lines, that the attainder of *Henry Pole* was thereby reversed. Nothing would have been easier than to say, if it had been so intended, that all the property and all the dignities possessed by *Henry Pole* should be allowed to flow on in succession as if there had been no corruption of his blood. But instead of that being the case, what your Lordships find is this, that the suppliants for the Act of Parliament, the two daughters of *Henry Pole*, state to Parliament that "*Henry* Lord *Mountague*, late father to your suppliants, was by the course of the common laws of this your realm of *England* attainted of high treason and by reason thereof" (that is by reason of the

attainder of their father), " your said obedient subjects stand and are as persons in their blood corrupted." Then, having stated that their only object in coming to Parliament is to undo that which had been done with reference to their father, it is prayed, " That your subjects *Katherine* and *Winifred*, and their heirs, may and shall be, by authority of this Act, restored and enabled onely " (I take that to mean wholly) " in blood as daughters and heirs to the said *Henry* late Lord *Mountague*, and that your said subjects and their heirs, from henceforth may and shall be enabled to demand ask, have, hold, and enjoy, all and every such honours, castles," manors, &c., " and all other manner of hereditaments with their appurtenances, which at any time shall come, remain, descend, or revert from any lineal or collateral ancestor of your said subjects."

Now, my Lords, I pause there before passing on to the exceptions, to observe in the first place, that the hereditaments which these ladies are by this Act enabled to claim are not hereditaments which, but for attainder, might have descended to them before that time, or which had descended to them, but hereditaments which, speaking with regard to the future, " shall come, remain, or descend, or revert," not from their father, but " from any lineal or collateral ancestor " of the two ladies. Of course, putting aside altogether the case of *Margaret*, that would have an intelligible meaning, because it would provide in favour of these suppliants that in case property should descend to them upon the side of their grandfather, Sir *Richard Pole*, or any ancestor of his from that side of the pedigree, it should come to them freely, notwithstanding the attainder of their father, which attainder otherwise would have interrupted that descent.

Not only does this speak with regard to the future, and not with regard to any present or any hypothetical past descent, but even this future descent is regarded with reference to property which might have been in the possession of their father at the time of the attainder. And I apprehend, that the reason for this qualification is this, that although the words in the first part of the sentence have a future aspect, still, those future words might be held to extend to property which their father possessed at the time of the attainder; but possessed in reversion or in remainder, and, for the purpose of excluding property of that kind, the Act contains

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the words "other than such castles, manors, lordships," &c., "with their appurtenances, which were of the said *Henry*," that is, belonging to *Henry*, "late Lord *Mountague* their father in possession, reversion, remainder, or otherwise, the day of the attainder of the said *Henry* late Lord *Mountague*, at any time after the treason by him committed or done, whereof the said *Henry* late Lord *Mountague*, was attainted." So that your Lordships will see so far from being an Act of complete restoring grace, there is here a careful exclusion of any restoration of a single acre of land which *Henry Pole*, Lord *Montague*, might have possessed at any time after the treason was committed by him. Then it goes on: "and other than such manors, castles," &c., "as your highness was or is entitled to have, or might or ought to have been entitled upon any office found or to be found by force of the said attainder, in such the same and like manner, form, and condition in the law, to all intents, constructions, and purposes, as if the said *Henry*, late Lord *Mountague*, father to your said subjects, had never been attainted, and as though no such attainder of the said *Henry* late Lord *Mountague* had ever been had or made;" there again making the attainder of *Henry*, and nothing but the attainder of *Henry*, the test of the extent to which this Act proposed to undo that which had been already done.

Then it continues, "And that your subjects and their heirs may hereafter use and have any action or suit, and make their pedigree and conveyance in blood as heirs as well to and from their said father as also to and from any other person or persons," not absolutely, but "in like manner, form and degree to all intents, constructions, and purposes as if the said *Henry*, late Lord *Mountague*, had never been attainted, and as if no such attainder were or had been had, the corruption of blood between the said *Henry*, late Lord *Mountague*, and your said subjects *Katherine* and *Winifred* and their heirs, or any other cause, matter, or judgment concerning the attainder of the said *Henry*, late Lord *Mountague*, or any other thing whereby the blood of the said *Henry*, late Lord *Mountague*, is or should be corrupted, to the contrary notwithstanding." Then there are provisoes following the tenor of the exceptions which I have read.

My Lords, nothing to my mind could be more clear than the

frame of this Act of Parliament. It is not to restore anything which was in *Henry* in the shape of property or in the shape of honour, it is not to restore anything which the Crown either had taken or might have taken by way of forfeiture from *Henry* by reason of his attainder: it is not to restore anything which could have come to the suppliants but for the attainder of any person other than *Henry*. It takes the attainder of *Henry*, and the attainder of *Henry* only, and it puts out of the way the effect and operation of the attainder of *Henry* for this object, and for this object only; to allow to come to the daughters of *Henry*, Lord *Montague*, inheritances which they might derive from persons as against whose succession the attainder of *Henry* would have been an obstacle. It removes no other obstacle whatever out of the way.

It appears to me, therefore, that with regard to the three peerages which I have mentioned, which must find their way and be traced, not through *Henry* in the first instance, but through *Margaret* his mother, that the attainder of *Margaret* remains at this moment in full force and operation, and that there is no succession to those peerages, which can be traced through *Margaret*.

But then a distinction is attempted to be taken with regard to the fourth peerage, namely that which is called the peerage of *Montague*. My Lord, with regard to that it appears—I say it appears, because here again I assume that the evidence establishes the fact—it appears that *Henry Pole*, Lord *Montague*, was summoned to and was present in Parliament in the 21st year of the reign of *Henry* VIII., that is the year 1529, and also in the year 1533-4, in which year he sat in Parliament on several occasions, and that he was summoned again to Parliament by writ in 1536, and was present at different times during that year. Then, as I have said already, he was attainted and beheaded in the year 1539. It was suggested at the Bar, and it is, indeed, asserted in the case, that the peerage, by virtue of which *Henry Pole* was summoned to and sat in these Parliaments, was a new barony created at this time in his favour; and that barony is claimed by the present Petitioner.

But, my Lords, it appears to me, and I think it will be your Lordships' opinion, that, notwithstanding the difference of the style, which is merely apparent and not real—because the names

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"*Montague*" and "*Montacute*" appear to have been used, both at this time and for many hundreds of years before, interchangeably, and in point of fact were one and the same words (1)—I say it appears to me that, notwithstanding this difference of nomenclature, *Henry Pole* was at this time merely sitting in Parliament by virtue of the barony possessed by his mother, and was in point of fact called by writ in virtue of his mother's barony.

I will, however, pause to say that even supposing it had been otherwise; even supposing the dignity of *Montague* had been, as is asserted by the Petitioner, a new peerage, I will ask your Lordships to observe that that really would not have bettered the position of the Petitioner. If that were so, the argument of the Petitioner would be reduced to this, that the Act of Parliament to which I have referred having, as I have said, no operation upon what was in *Margaret*, and having no operation upon any land or property which was in *Henry Pole* so as to carry it to his daughters, would only be operative, and must be supposed to have been passed in order to be operative, upon the only other remaining thing in *Henry* —the new barony supposed to have been created in him at the time I have mentioned, namely 1529. Now, I must say that anything more improbable to my mind cannot exist than this, that the Crown having had it in its power, if so minded, to create at this time an honour in favour of one or both of the daughters of *Henry Pole* or of their husbands, would have gone through the ceremony of having this Act of Parliament passed in order to effect this object, and this object only, to provide that the barony, which is supposed to have been created in *Henry* the father, might come by descent from him as a new barony to his daughters, between whom it would rest in abeyance. I think that would be a very absurd theory to suggest with regard to this Act of Parliament.

But, my Lords, I very greatly doubt also whether the Act of Parliament would have that effect, even if you supposed that there was this peerage in *Henry Pole* of his own right, because it appears to me that under that very large collection of drag-net words which your Lordships find in the Act it would be, to say the least, extremely doubtful whether a peerage of the kind I have described would not be included, and would therefore be excepted out of the

(1) See *ante* p. 306, n.

operation of the Act as that which was made incapable of passage from the father to the daughters.

Passing from that, I turn to the other alternative, the hypothesis that *Henry Pole* was sitting in Parliament, not in his own right, but as being called by writ in virtue of his mother's barony. Now, my Lords, I do not at all desire to express any opinion on what may be, I think, a point of considerable difficulty, namely, what would be exactly the effect of an attainder coming upon a mother or a father, the owner of dignities, at a time when a son had been called to Parliament, and was sitting in Parliament in respect of a barony or of any of the dignities of the parent. I think it quite sufficient to say that there appears to me to be no principle upon which your Lordships could hold, that the circumstances of a son being called to Parliament, and sitting in Parliament by writ of summons, in virtue of a barony of his father or his mother, if his father or mother should be attainted for treason, would save from the consequences of that attainder, the barony, in respect of which he had been called to sit in Parliament by writ. I think the learned counsel for the Petitioner have not in any way established the proposition that if it be supposed that *Henry Pole* was sitting in Parliament, called by writ in respect of his mother's barony, that would save that barony from the consequence of the attainder of the mother, and would leave it as a barony to go, as it were, by a sort of fresh descent from *Henry Pole*, the son, who was sitting in Parliament in respect of the barony.

Therefore, my Lords, whether it be taken that the *Montague* barony was a new barony created in the sixteenth century in favour of *Henry Pole*, or whether it be taken, as I think is much the sounder view, that *Henry Pole* was sitting in Parliament by writ in respect of the barony of his mother—whether the one theory or the other be adopted, it appears to me that in either case the Petitioner has failed to make out his title to the *Montague* peerage, just as he has failed to make out his title to the other three peerages which I mentioned first.

That being the view I feel it my duty to submit to your Lordships; if your Lordships take the same view, it, of course, becomes altogether unnecessary for us to hear the Attorney-General upon this question. To my mind the Petitioner has not made out his

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case in any respect, and I shall move your Lordships to resolve accordingly.

LORD CHELMSFORD :—

My Lords, I agree entirely with my noble and learned friend, and if I were to go at length into the case I should only repeat what he has said. Therefore I will only make this observation, that the Act of 1553 is to be construed by itself, and not by any conjecture as to intention; and, acting upon that principle, nothing could be clearer to my mind than that the intention and effect of the Act were to restore the blood of the daughters so far, and so far only, as it was corrupted by the attainder of *Henry* Lord *Montague*.

LORD HATHERLEY :—

My Lords, for the same reasons as have induced my noble and learned friend beside me (Lord *Chelmsford*) to abstain from farther comment upon this question after the full discussion the matter has received from my noble and learned friend the Lord Chancellor, I will simply say that I entirely concur with the view which he has taken upon both points, namely, that the Act of 1553 has not the effect of doing, that which it indeed does not purport to do, namely, restore the blood of the daughters of *Henry* Lord *Montague* beyond the effect which the previous attainder of their father had produced; and, secondly, that the fact of the son, *Henry* Lord *Montague*, sitting in Parliament in respect of his mother's barony, did not save that barony from the fate of the others, when she herself was attainted.

LORD O'HAGAN :—

My Lords, I entirely concur with my noble and learned friends, and I can add nothing whatever to the full statement made by my noble and learned friend opposite (the Lord Chancellor). I shall only say this, in my view we must be guided altogether in determining this question by the very words of the Act of Parliament. The extremely ingenious argument that was presented to us, with respect to the probable liberality and charity of the Legislature in passing the Act we have been considering, does not affect my mind

at all. Whether you look to the title of the Act, which regards only the blood of the daughters of *Henry Pole;* whether you look to the description of the corruption of the blood which is said to have been produced only by his attainder; whether you look to the restitution which regards only the daughters of *Henry* and nobody else; or whether you look to the exceptions which save the Crown rights with reference to the property of *Henry*, and not at all with reference to the property of *Margaret*, I think in every view the judgment which has been suggested by my noble and learned friend will be entirely correct.

It was then resolved that the Petitioner has not made out his claim.

Lords' Journal, 7th July, 1874.

Agent for the Claimant: *Edward Walmisly.*
Agent for the Crown: *The Solicitor of the Treasury.*

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July 10, 13, 14.

AND

THOMAS FOSTER, HENRY VYSE, AND EDMUND WALLER VYSE . . . . . RESPONDENTS.

Partnership—Executors—Trusts.

19 Eq 344
1 App Cas 198
16 Ch D. 643
653-6
4 App Cas
697
W N 83 188

R. V. was the chief partner in a large and prosperous trade. By the articles of partnership (which were to take effect from the 30th of June, 1853), the cash accounts were to be balanced monthly, the stock and the value of each partner's share were to be ascertained on the 30th of June in each year, and be written into as many books as there were partners, and each partner was to sign and to possess one book, and be bound thereby. If any partner should die, the partnership as to him was to cease, and his share was to be divided among his surviving partners in proportion to their existing shares, and the value of his share was to be ascertained as at the last stock taking, and it was to be paid for by promissory notes payable at six, twelve, eighteen, and twenty-four months date; and the surviving partners were to execute a covenant of indemnity to the estate of the deceased partner, whose executors were to execute a transfer of his share. *R. V.* died shortly after the stock-taking of 1855, but before the results of it had been duly made up and entered in books. *R. V.* had, by his will, appointed his brother (then one of his partners) to be one of his executors; another executor was his eldest son, who was not then a partner, but afterwards became so. He directed a sale of his real property, its produce to form part of his personal estate, which he directed to be converted into money and divided equally among his children; as to the males, part at twenty-one, the remainder at twenty-five; as to the females, at twenty-five, with a provision for maintenance in the meantime. The articles of partnership were acted upon as to the mode of taking the partnership accounts, and so were the directions in the will so far as to the payment of interest on capital, but no promissory notes were given by the partners, nor any covenant of indemnity executed. The shares of the children were duly allotted, and their intermediate allowances paid, but the real estate was not sold, nor the personal estate converted, the money to which the testator had been entitled being really permitted to remain in the trade, accounts of profits being duly kept and appropriations to the various children regularly made. The youngest child, on arriving at twenty-five years of age, filed a bill against the executors as for a breach of trust in not executing the directions in the will; and she prayed for accounts and a declaration of her liberty to elect between the receipt of profits and the receipt of interest on the money that ought to have been invested:—

Held, that the bill was not sustainable; that the will could not affect the articles of partnership; that those articles constituted a contract for the sale of the testator's share to his partners, though the time for the sale was not fixed; that the giving of the promissory notes by the partners in the con-

cern to the executors, some of the persons filling both characters, would have been a useless formality; that mere delay in the payment of the value of the share did not affect the validity of the contract; and that no misconduct in fact being established, the bill must be dismissed.

Per LORD HATHERLEY:—Time was not, here, of the essence of the contract.

There were other partners in the business besides those who were executors:—

Held, that on a bill against the executors, all of whom were not partners, nor were all the partners executors, there could not be a general decree for an account of the profits of the partnership.

The testator had some freehold property: the will directed that all his real and personal estate should be vested in his trustees and executors, to convert it into personalty, and invest, &c. The executors and trustees built a villa on a part of the freehold, in the belief that they could thereby improve the value of the rest. They had no authority to do this, but as they had done it *bonâ fide*, they were allowed to take the freehold property to themselves, including its value in the general account.

Jones v. *Foxall* (1) commented on.

THIS was an appeal from a decision of the Lords Justices, which had varied a previous decree of Vice-Chancellor *Bacon* (2).

Richard Vyse was the senior partner in the firm of *Vyse & Co.*, carrying on business as straw hat merchants at *London* and *Luton* and in *New York*, and at *Prato*, in *Italy*. The other partners in the firm with *Richard Vyse*, at the time of his death, were his brother *Henry Vyse* (one of the Defendants in the suit, and now one of the Respondents here), *John Reynolds*, and *Thomas Andrew Vyse*. By their articles of partnership, dated the 17th of September, 1853, each partner was to have 5 per cent. interest on his capital, and the surplus profits were to be divided in shares of sixteenths, of which *Richard Vyse*, the testator, was entitled to six. The accounts were to be taken on every 30th of June. The valuation of the capital and stock was to be written into as many books as there were partners, and each partner was to sign one of these books, and to be bound thereby. It was provided that in case of the death of any partner, the partnership should cease as to the partner who should so die, and his share should be divided among the other partners, and its value should be ascertained and determined with an allowance, "in lieu of profits," at the rate of 5 per cent. per annum upon his share of the capital, as therein provided, such value to be ascertained by means of the balance

(1) 15 Beav. 388. (2) Law Rep. 8 Ch. Ap. 309, 315, n.

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sheet made out at the stock-taking on the 30th of June. The moneys found to be due to the executors of the deceased partner were to be in full for the purchase of his share, and were to be paid by the promissory notes of the surviving partners, with interest at the rate of 5 per cent. per annum from the day of his death. The promissory notes to be given by the partners to the executors, were to become due at six, twelve, eighteen, and twenty-four months respectively, and the executors were to execute a transfer of his share. If the partner should die after the annual acccount-taking on the 30th of June, no new valuation was to be taken on his death, but the value was to be taken as of the profits to which he would have been entitled on the 30th of June.

The testator died on the 13th of July, 1855. By his will, dated the 15th of September, 1854, the present Respondents were appointed his executors and trustees. At that time *Edmund Waller Vyse* (the eldest son of the testator, and named as one of his executors) was not a member of the partnership, but he became so in 1859. The executors and trustees were directed, "as soon after my decease as they may think advisable, to sell and dispose of my real estate" and "net money arising from such sale shall be deemed and considered as part of the residue of my personal estate." He then gave all his "household goods, &c., and all my stock-in-trade, ready money and securities for money, debts due to me owing, and all other my personal estate and effects whatsoever," subject to the payment of debts and legacies, to his said executors, "upon trust to convert the same into money as soon as convenient after my decease, and lay out or invest in real or Government securities" such a sum as would be sufficient to produce £300 a year for his wife, and after her decease or marriage to "pay, divide, or transfer the principal sum so invested" equally amongst all his children living at her decease. The shares of the sons were to be payable, half at twenty-one, the other half at twenty-five; the shares of the daughters "at their respective ages of twenty-five years."

The Appellant was the testator's youngest daughter, and was eleven years old at her father's death. A balance-sheet was made up on the 30th of June, 1855. It was said to have been made with the full knowledge of the testator, but at the time of his

death it had not been made up in a book and signed, as required by the articles of partnership. By that balance-sheet the testator was found entitled, taking principal and interest and other matters together, to a sum of £107,601 2*s.* 6*d.* Of this a sum of £90,000 was soon afterwards apportioned, by the declaration of the executors, among the children, making a sum of £9000 for each, the apportionment being treated as having been made at the period of the testator's death. In 1861 a farther sum, amounting to £1300 for each child, was apportioned among them; and in 1867 an additional sum of £1000 for each was also apportioned, and in the accounts kept by *Henry Vyse* these sums were duly carried to the credits of each child. The sums thus apportioned were not withdrawn from the business, but were treated as debts due from the firm to the executors, bearing interest at the rate of 5 per cent. per annum, with yearly rests; the amount was credited to the estate of the testator, and the debt was treated as wholly distinct from the capital of the firm. No promissory notes were given in the form and for the dates mentioned in the articles of partnership, nor was there any deed of indemnity executed. The amounts thus stated did not consist of money actually in the hands of the partners, but of investments in the business which they had not called in, and debts which, for some long time after the testator's death, they were unable to realise. In 1867 and 1868 they found that they had an amount of capital which they could not profitably employ, and they invested for the benefit of the Appellant the sum of £3173 5*s.* in the purchase of Indian 10 per cents. and a farther sum of £7956 17*s.* 6*d.* in 3 per cents. The Appellant was allowed interest on what was due to her from the firm, and she was charged interest on what was drawn for her use.

All the testator's children, except the Plaintiff, approved of what had been done by the executors, and were in the habit of allowing sums of money belonging to themselves, of which they did not require the use, to remain in the hands of the firm, receiving therefrom 5 per cent. interest for the same.

The Plaintiff attained twenty-five in October, 1869, and in August, 1870, filed her bill against the executors complaining of the retention of the testator's estate in the business, and asking

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for an account of profits, and claiming the option of taking so much of the profits as had accrued on her share of the moneys retained in the business, or compound interest at 5 per cent. on her share of such moneys.

The testator while alive had resided at *Luton*. He had a few acres of freehold land there (which formed part of the "real estate" mentioned in his will), and the trustees, believing that they should thereby improve the value of the property, had erected a villa residence upon a part of this land at a cost of £1600, which had ever since been let upon a repairing lease for £80 a year. Some of the remaining land was sold at an average of £700 an acre, and a small portion, together with the villa, still continued in the hands of the executors. The Plaintiff charged the employment of the £1600 to have been a breach of trust, and prayed that it might be so declared, and that it might be disallowed to the Defendants in passing their accounts.

The decree made by Vice-Chancellor *Bacon* upon the hearing of the cause in May, 1872, declared the outlay of £1600 in erecting the villa to have been unauthorized by the will, and ordered it not to be allowed, as against the Plaintiff, in the accounts; and he directed accounts as to what part of the estate of the testator had been and still was employed in the business, and what profits had been derived therefrom, and that the Defendants were to be charged with such profits and with interest thereon at 5 per cent. per annum from the time when such profits were made; and he directed an inquiry, having regard to the previous directions, as to the real and personal estate of the testator, and as to the amount of the Plaintiff's share in the residuary estate.

On appeal the Lords Justices varied this order, and directed that the order for an account of profits should be discharged; that the Plaintiff should have a common decree for the usual accounts, with a direction to ascertain her share of the residue, and what part of her share had remained in the successive firms of *Vyse & Co.*, the Defendants to be charged with 5 per cent. interest on the amounts from time to time in the hands of the partnerships, such account to be taken with annual rests, and the Defendants to be allowed a like interest on all payments properly made to or for her. As to the villa, their Lordships conceiving

what had been done to have been done *bonâ fide* to increase the value of the whole property, the trustees were to be allowed to take the villa to themselves at the price of £1600, and also the rest of the land, the value of which was to be ascertained on affidavit.

Mr. *Kay*, Q.C., and Mr. *A. G. Marten*, Q.C. (Mr. *Romer* was with them), for the Appellant:—

The property to which the Appellant was entitled under her father's will has been improperly dealt with by the trustees, and she has therefore a right to full accounts. They were directed by the will to deal with it in a particular manner, they have not followed those directions, but have retained the capital in the business, in which one of the trustees has always been a partner. That alone is a sufficient ground for granting the accounts. If it should be said that, in the articles of partnership, there was a contract for the sale to the surviving partners of the share which had belonged to the testator, and that that authorized the retention of the capital in the business, the answer is that the testator had not manifested any intention to that effect. He desired, of course, that the articles of partnership should be performed, but performed in the way directed in the articles themselves and in his will, that is by an actual sale of his share, the value of that share to be ascertained and paid for in a particular manner. The neglect of the trustees to comply with any of the directions in the will renders them answerable: *Piety* v. *Stace* (1); *Brown* v. *De Tastet* (2); *Crawshay* v. *Collins* (3); and they may be called on either for an account founded on the profits of the business or for interest on the money itself. The *cestui que trust* has a right to elect between these remedies: *Heathcote* v. *Hulme* (4). That case was expressly founded on *Burden* v. *Burden* (5), which the Master of the Rolls there cited from manuscript notes, and the decision was given although the Master of the Rolls intimated that nothing had there been done improperly, but only without legal authority. *Docker*

(1) 4 Ves. 620.
(2) Jac. 284.
(3) 15 Ves. 218.
(4) 1 Jac. & W. 122.
(5) Ibid. 134, Reg. Lib. A. 1804, fol. 1185; and Reg. Lib. A. 1814, fol. 497; see the note at the end of the report.

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v. *Somes* (1) is a strong authority to the same effect. In a case of a similar kind arising in bankruptcy, Lord *Eldon*, by his final reference to the Master, in *Crawshay* v. *Collins* (2), included stock in trade and its value, as well as the capital, in the inquiry to be made as to the use of particular property after a bankruptcy.

If the will and articles of partnership could not be carried into effect literally, the executors were not entitled to disregard them altogether, but were bound to have a sale, and then a division of the whole property, but could not dispose of the property according to their own pleasure: *Cook* v. *Collingridge* (3). The classification of the cases in which the estate of a deceased partner is entitled to participate in the subsequent profits of a trade where his capital has been employed, is made by the Master of the Rolls in *Wedderburn* v. *Wedderburn* (4), and the present case falls clearly within the third class there described, for here the surviving partner is also the personal representative. And there is no settled rule as to the proportion of profits to which the estate of the deceased partner may be entitled, nor will the Court, limiting its amount within certain bounds, decide on such proportion except after a previous inquiry as to all the circumstances involved in the matter. The mistake in the Court below was in treating these persons as purchasers of the testator's interest—they are to be treated only as surviving partners: *Willett* v. *Blandford* (5). And that is the stronger, because there the executor had a perfect and undoubted right to carry on the business and employ in it the capital of his deceased partner, while here no such right existed. *Stocken* v. *Dawson* (6) is another instance in which an executor employing the funds of a deceased partner in the trade was held liable to account for the profits, and that was a case in which the executor of the surviving partner, if he did not himself purchase the business, was authorized by the will to continue it. *Travis* v. *Milne* (7) establishes the liability of executors to account for profits where they have used the capital of the testator in trade, even though no impropriety is charged

(1) 2 Myl. & K. 655.
(2) 1 Jac. & W. 267, 279.
(3) Jac. 607.
(4) 22 Beav. 84, 100; see 2 Keen, 722; see 4 My. & Cr. 41; 8 L. J. (Ch.) 177.
(5) 1 Hare, 253; 11 L. J. (Ch.) 182.
(6) 9 Beav. 239; 17 L. J. (Ch.) 282.
(7) 9 Hare, 141; 20 L. J. (Ch.) 665.

against them. It is no objection here that all the executors are not partners, nor all the partners executors. In *Flockton* v. *Bunning* (1) all the parties brought before the Court were not executors or trustees, but that did not prevent the Vice-Chancellor from making a decree against them all, for they knew the facts, and had really taken part in the wrongful act of the executrix, and so they had to account for all the profits that had been made in the trade in which the money had been improperly employed. And this decision was sustained on appeal to the Lords Justices. Then in *Jones* v. *Foxall* (2), where a trustee had allowed the *cestui que trust's* money to remain for a long time in a trading concern, though, before the bill was filed, he paid it with 5 per cent. interest, he was held liable to account, with annual rests, because of the profit he had made with it in trade, and to bear all the costs of the suit. So in *Stroud* v. *Gwyer* (3), though the testator had there given his executors liberty to embark his capital in a certain trade upon such terms as they should think fit, they were held not only liable to the *cestui que trust* for the 5 per cent. interest agreed on between the partners; but, they having agreed that part of the profits should be left in the concern as "additional capital," they were held liable to account for the interest itself as additional capital and not as mere income. *Macdonald* v. *Richardson* (4) and *Townend* v. *Townend* (5) also shew that where the trustee has improperly allowed the *cestui que trust's* money to be employed in trade he must account for the profits, and in the latter of these cases, there having been a sum of £12,000 directed to be put by for the benefit of the daughter, to whom interest was to be paid thereon for her benefit, but such interest as was not paid to her was to accumulate with rests, it was decreed to be payable as from the date of the intended accumulations. In making such calculations no allowance is to be made to the trustee for performing the duty cast on him: *Freeman* v. *Fairlie* (6). It is clear here that if these Respondents had not been partners in the trade they would have called in the money, but, being partners, it was of advantage to their business to let the money remain in the trade.

(1) Law Rep. 8 Ch. Ap. 323, n.
(2) 15 Beav. 388; 21 L. J. (Ch.) 725.
(3) 28 Beav. 130.
(4) 1 Giff. 81.
(5) Ibid. 209.
(6) 3 Mer. 24.

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They had therefore a direct benefit from their breach of trust. As they have thus derived a benefit from the employment of the money they must account for the profits thereby obtained, for it is the settled principle of equity that a trustee is not to obtain a benefit for himself from the use of the trust fund, and if he does so, he commits a breach of trust, and must hand over what he has obtained, to the *cestui que trust*, from the use of whose money he has obtained it.

Then, with respect to the erection of the villa, the only direction in the will was to sell the real estate, and the net produce thereof was to constitute part of the residue. In no respect whatever had the executors followed this direction. They had not sold the real estate, but had employed part of the personal estate to build upon it, and were now receiving rent for the house which they had erected. This was a clear breach of trust, and an appropriation of the money of the testator not only unwarranted by, but in actual contradiction to his direction. The trustees must be treated as to this as if they had wasted the property, and ought not to be allowed it in making up their accounts.

Mr. *Cotton*, Q.C., and Mr. *Fry*, Q.C. (Mr. *Rowcliffe* and Mr. *Kekewich* were with them), for the Respondents:—

The general propositions of Equity asserted by the other side are not disputed, nor are the cases cited questioned, but they have no application here. There was here no loan of the testator's money which had come to the Respondents' hand, nor was there any employment, by them, of his money in their own trade or business, so as to render them liable to account for profits. The articles of partnership constituted a contract which the testator's will did not and could not disregard. By those articles the surviving partners became on his death the purchasers of his share of the business. This case much resembled that of *Simpson* v. *Chapman* (1), where the characters of partner and executor were utterly distinct, and no liability as executor existed at all. The executors here had only to follow the articles of partnership so far as they could, and they had done so in every way but one, they had not strictly required payment for the testator's share in the

(1) 4 De G. M. & G. 154.

way nor at the time at which they might have done so, for if they had they would have injured the interests of the Appellant as well as of the other legatees, but they had kept regular accounts of the business, and had duly paid, or given credit for, the interest at 5 per cent. on the capital, and had done so with annual rests. In every respect, except that of formally calling in the debt, they had strictly and accurately performed their duty. That was sufficient: *Coventry* v. *Barclay* (1). If accounts were taken it would be seen that the course they had pursued had been largely beneficial to the Appellant, but there was no ground whatever for requiring them to render accounts in the way now demanded There was not a single matter on which the facts disclosed any reason for the Appellant claiming to ask relief from a Court of Equity. [The cases cited on the other side were commented on for the purpose of shewing that they did not apply to the circumstances of this case.] The good faith with which the Respondents had acted made the principle adopted in the case of *Attorney-General* v. *Alford* (2) applicable, not adversely but favourably, to the Respondents, for they had not rendered themselves in any way liable to this demand; yet even there, where there was undoubtedly negligence (not at all existing here) on the part of the executor, as there were no circumstances to lead to the conclusion that the executor had personally made any profit, he was only charged with an amount of interest which was less than the Respondents here had actually paid, and the Court there plainly indicated that such charges ought not to be made against executors who had not in any way been guilty of misconduct. There was not a pretence to charge misconduct here. There was no such principle in Equity as that surviving partners might not become purchasers from the representatives of a deceased partner: *Chambers* v. *Howell* (3). The only question is whether the transaction is a fair and honest one. Here the purchase was in fact the result of a contract entered into by the deceased partner himself; the whole transaction was for the benefit of the legatees, and the bill ought to have been dismissed.

As to the investment of the £1600 in the erection of the villa,

(1) 3 De G. J. & S. 320. (2) 4 De G. M. & G. 843.
(3) 11 Beav. 6.

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that had been done in the honest (and not mistaken) belief that the general property would be thereby benefited, and there was no ground whatever for calling on the Court to treat that as in any way amounting to a breach of trust or to an act of impropriety in any way. The amount expended ought to be allowed in the account.

Mr. *Kay* replied.

THE LORD CHANCELLOR (Lord *Cairns*) :—

My Lords, I will, in the first place, point out to your Lordships that at the close of the opening of the appeal in this case an objection was taken to one part of the decision of the Lords Justices which had reference to a particular item in the account of the executor connected with the building of a house called *Holly Lodge*. I mention that first in order to put it aside from the main question in the case. A proposal was made, on the hearing before the Lords Justices, which, if accepted by the Appellant, would have given to her everything which under any circumstances she could have demanded from the executors with reference to the outlay upon that house. The Lord Justice *James* said: "If the Plaintiff presses it, the trustees being willing, may be ordered, as between them and her, to take the villa themselves, as at the price of £1600, and the value of the site as unbuilt on, as to which an affidavit may be produced to us." My Lords, it was for the Plaintiff to ask for an order to that effect if she had been minded to accept it. No such order was asked for; and inasmuch as it seems to me that that proposal or offer was the utmost to which the Appellant could be entitled, this part of the appeal appears to me altogether to fail.

But, my Lords, the main and much more difficult question in the case is that which has occupied a great deal of argument at your Lordships' Bar. I do not think that that argument is to be regretted, because the principles brought into question in this case are of extreme importance in the administration of the system of Equity. They are principles which, so far as they are well founded and well established, should not be in any way departed from or weakened. On the other hand, they ought not to be strained, or

applied to cases to which, upon a just appreciation of the foundation of the principles, they have no real application.

My Lords, it is a well-settled rule of the Court of Chancery that a trustee or an executor who uses trust-money in trade must account for the profits which he makes by that use of it; and I shall be most careful not to allow a word or an expression to fall from myself, and I should much regret it if any word fell from your Lordships, which could give rise to the impression that that old, well-established, and most wholesome doctrine of the Court of Equity was to be in any way departed from or weakened.

My Lords, with regard to the application of that principle to partnerships, I may mention two very familiar examples, which really will be found to be the cases under which almost, if not quite, all the authorities cited at your Lordships' Bar may be ranged. If a partner in a trading firm dies, and if he constitutes one or more of his copartners his executors, and if there is nothing special in the contract of copartnership, and if the assets of the testator are not withdrawn from the copartnership, but are left in it, and no liquidation is arrived at, no settlement of accounts come to, it is a trite and familiar rule in the Court of Chancery to hold, that the estate of that testator is, to all intents and purposes, entitled to the benefit of a share of the profits which are made in the trade after his death. And, my Lords, if this should happen, which is the principle of another class of cases, that the partnership articles have given the surviving partners an option to take to the interest of the testator on certain terms, at a certain price, to be fixed by arrangement after the death of the testator, an option or power which may be accepted or refused, but which if accepted and acted upon, must be acted upon according to the terms on which it is given; if I say, in a case of that kind, the surviving partners, or one or more of them, being also executors of the deceased partner, are found not to have pursued exactly the terms of the power or option which has been given, there again the power or option to become purchasers of the interest of the testator after his death falls to the ground, and the partnership remains an unliquidated partnership, to a due share of the profits of which the estate of the testator will continue to be entitled until liquidation actually takes place.

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Passing from those two classes of cases, let me point out to your Lordships' attention the facts of this particular case, so far as it is necessary to refer to them. The testator was a partner in a firm constituted in the year 1853; and by the articles of partnership then agreed to, it was provided that in the event of his death the surviving partners should become actually entitled to the whole of the partnership, and of the assets belonging to it, including the share of the testator; that they should become the purchasers (for the term "purchase" is used in the articles) of the whole of the interest of the testator upon certain terms which are mentioned in the articles. I do not go into those terms in detail, because they are fresh in your Lordships' recollection, but the purport of them is this, that whereas the articles contemplated that a settlement, or stocktaking, should take place at a certain period in every year, it was provided that the result of the stocktaking of the 30th of June, which should happen next before the death of the testator, should be the criterion of the amount of his interest in the concern, that certain allowances should be made, by way of interest, in lieu of profits which might have accrued between that time of stocktaking and the time of the testator's death, that then for the whole of the purchase-money which should be payable in respect of the interest of the testator in the concern, which purchase-money was to be ascertained in the way I have mentioned, promissory notes should be given, making the purchase-money payable by four instalments covering a space of two years, and that a bond of indemnity should be given by the surviving partners to the representatives of the testator.

These were the provisions of the articles; and your Lordships, even from the statement I have given of them, and still more if you will refer to them in detail, will observe how carefully those articles are framed to constitute, on the one hand the relation of vendor and purchaser between the estate of the testator and the surviving partners, and on the other hand to exclude carefully the idea that there was to be any reckoning whatever of profits, not merely from the day of the death of the testator, but from the day of the stocktaking which might occur next before his death.

Well now, my Lords, what took place was this: The testator died on the 13th of July, 1855. There had been a stocktaking

for the year 1854; but, as I understand it, there had not been at the time of the death of the testator what might be termed a concluded stocktaking for the 30th of June, 1855. The stock account for the year ended the 30th of June, 1855, is printed; and although it does not appear to have been seen (I believe it is stated that it was not seen, and that it could not have been seen) by the testator, yet it proceeded upon the footing of the previous stocktaking of the year 1854, and contains upon the one side of it and upon the other what were supposed to be the liabilities and the assets of the firm at that time.

My Lords, I wish to say with regard to this stock account, that if the case of the Appellant here (the Plaintiff in the Court of Chancery) had been this — I do not ask for the profits made by the trade of the testator after his death, but I seek to have it ascertained that the sum which is contemplated in the partnership articles as the purchase-money for the interest of the testator was properly adjusted, and for that purpose I wish to have an inquiry whether the stock account for the year ended on the 30th of June, 1855, is properly described and properly adjusted by that statement—if, I say, that had been the case of the Plaintiff in the Court of Chancery, I could have placed upon it a very different construction from that which I place upon the claim made by her bill, and there might have been much to say, in my opinion, for a claim to have an inquiry limited to that one object. But, my Lords, I find nothing whatever in the prayer of the bill, or in the statements leading to the prayer, pointing to this kind of relief. And in point of fact, from the explanation which your Lordships have had, you will, I think, readily perceive that there is scarcely any item in the whole of this stock account on either side which could by possibility be the subject of doubt or of controversy. There might be some question as to the propriety of allowing some book debt of very small amount; there might be some question as to the value of some stock in hand, not a considerable sum; but as regards all the other matters in the account, they are scarcely matters upon which any controversy could arise.

But now, my Lords, supposing the partnership contract to be of the character which I have described, the question which naturally arises, in the first place, is this: When the testator died,

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if he had not constituted any of the surviving partners his representatives, what would have been the position and what would have been the rights of the various parties? My Lords, I apprehend it to be perfectly clear that in that case the surviving partners, standing at arms' length towards the representatives of the testator, would have had a right to say that they were purchasers under this contract, that all the ordinary consequences of their position as purchasers ought to follow, and ought to be maintained, and that no qualification should be engrafted into the contract as to the time of payment beyond either what the contract itself expressed or beyond those rules of law or of equity which bear upon contracts requiring payments to be made at certain specified times.

My Lords, in point of fact the testator appointed as one of his executors one of his partners, Mr. *Henry Vyse*. I apprehend it to have been perfectly clear that the testator could not, by appointing one of his partners as his executor, annul that partnership contract which he had deliberately entered into. I cannot admit that it was necessary for the person so appointed executor to disclaim the executorship in order to save his contract. In the view, at least, of a Court of Equity, I apprehend that the contract remained in full vigour, even although there might, from the peculiar position of the executor as a surviving partner, be reasons for watching narrowly the course which he would take with regard to the fulfilment of the contract.

Now, my Lords, what the executors, including the surviving partner, did after the death of the testator was this: they proceeded upon the stocktaking, to which I have referred, they opened an account in their books with the estate of the testator, and they carried to that account, and placed to the credit of the estate of the testator, the sums which from time to time they put aside as representing the payments which they would have to make in respect of the share of the testator in the partnership. They did not give the promissory notes to which I have referred; and, if given, those promissory notes obviously would have been of no legal value. They did not give in form the deed of indemnity which was stipulated for in the articles of partnership. But both by the ordinary law in such a case, and by the very provisions of

the articles of partnership, they would be bound, although perhaps not with the stringency of a deed under seal, to afford that indemnity to the estate of the testator.

My Lords, one of the nine children of the testator among whom his estate was divisible, the present Appellant, *Emily Vyse*, attained the age of twenty-five, at which she was to enter into possession of her share, in the year 1869; and the present bill was filed for the purpose of asserting her right to an account of the profits made by means of the money which ought to have been paid in the instalments to which I have referred during the two years after the death of the testator, but no part of which was in point of fact paid during those two years. That was the claim made by the bill; and the profits which the bill sought to have an account of, and to recover, were profits made by the employment of the whole of that money in the trade, and not merely that share of the profits which it might be found had been received by the executor or executors of the testator. A decree was made by the Vice-Chancellor *Bacon* in substance giving effect to this claim, and that decree was reversed by the judgment of the Lords Justices, from which the present appeal is brought to your Lordships' Bar.

The first observation which I have to make to your Lordships upon this claim of the Appellant is this: The profits, as I have said, which are claimed by the Appellant are the whole of the profits which may be found to have been made by the continuance in the trade of the sum which ought to have been paid out as the value of the interest of the testator in the concern. The partners other than the executor of the testator are not present before the Court, and the effect of the claim and the effect of the decree is to make the executor or executors who are present before the Court answerable not merely for what they had received themselves, but for what the whole of the partners in the concern had received since the death of the testator.

My Lords, I am bound to say that it appears to me that whenever a case shall occur in which relief upon the footing of an account of profits ought to be given, if it should appear that the executors of a deceased partner, acting along with surviving partners, have deliberately and without justification employed the assets of the testator in the trade of the partnership, I should

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expect to find that the Court of Chancery would be prepared to hold that all partners, not merely those who are executors of the testator, but also the surviving partners who are not executors, would be liable to account for profits made by the employment of that which to the knowledge of all of them is trust-money which ought not to have been so applied. But, my Lords, I have not heard of any case, and I have not been able to find any case—for I put aside the case of *Brown* v. *De Tastet* (1) by reason of the great peculiarity of the facts of that case—I repeat, I have not been able to find any case where one surviving partner, being an executor, has been made answerable for the whole of the profits made in the trade by the employment of the capital of the testator, those profits being received not merely by the executor but by other partners not brought before the Court, nor subjected to any liability under the decree. I make that observation in order that it may not appear that the circumstance has been overlooked in the present case, that no relief is asked or granted against the other partners.

But I pass from that for the purpose of making this other observation. It appears to me beyond all doubt that these partnership articles constitute a contract in the clearest and most distinct sense of the term, a contract between persons who were entirely *sui juris*, and who were able to decide among themselves what should be their rights and in what relations they or their representatives should stand towards each other, after their death. And I read the contract, as I have already said, as being a clear and absolute contract for purchase; not an optional, but a complete contract, binding all parties, for the purchase of the interest of the testator on the 1st of July by those partners of his who might survive him in the concern. It is true that the terms of that contract provided for payment at certain intervals. The contract might have been made conditional upon those payments being made at those particular times; it might have been said that the surviving partners should have a right to become proprietors of the whole of the trade, provided they gave a bond, provided they gave promissory notes, provided the payments in respect of the capital of the testator were made at the particular times indicated.

(1) Jac. 284.

But the contract does not run in that way, but it is an absolute contract of purchase, containing stipulations of the ordinary kind for the payment of the price. My Lords, I cannot read those stipulations as to time as being of the essence of the contract, and therefore I cannot admit that the argument of non-payment *ad diem* of these sums would of itself put an end to the contract.

But, my Lords, I proceed farther than that, for the purpose of pointing out to your Lordships that when the matter is looked at in this way your Lordships cannot but view this bill of the Appellant as a bill which is really framed to rescind a contract, and to turn that which is a purchase of the assets of a concern into an ordinary liquidation of that concern, as if there were no contract at all. Then I ask, against whom is this rescission of the contract directed? Is it against all the parties to the contract? Undoubtedly not. It is a bill aiming at the rescission of the contract, but directed only against one party to the contract, namely, the executor of the testator. No notice whatever is taken of the other parties to the contract, and as to the other parties to the contract, the surviving partners who are not executors, they have a right to say, and they are left at liberty by these proceedings to say, that the contract continues, that they are bound by it, and that they are entitled to the benefit of it. The proceeding is a more anomalous one than any I ever recollect. It is a proceeding attempting to rescind a contract binding a number of persons, and yet to rescind it only as to one out of the several persons who are bound by it.

Then again, my Lords, in connection with this there is this question: If the Plaintiff is limited, as I apprehend she must be limited, in any relief she may ask to the surviving partner who is the executor of the testator, what is to be the position of the other partners? The contract cannot be rescinded as to them. There will be, so far as they are concerned, the interest running upon the sums which represent the purchase-money of the testator's interest. And this farther anomaly would arise, there would be a reckoning of profits in respect of the share in the concern of the executor, and there would be a reckoning of interest upon other parts of the principal sum, in respect of the share in the concern of the surviving partners, who are not executors. My

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Lords, this really reduces the claim of the Appellant to a simple absurdity. It is the universal practice of the Court in a case of this kind, that if relief is sought, and if relief can be obtained on the footing of an account of profits, it must be an account of profits and nothing else, and it must be an account of profits for the whole period, and in respect, as it appears to me, of the whole sum; and the mixture to which the Appellant is obliged to resort, of a claim for profits and a claim for interest, shews of itself how untenable is the proposition of the Appellant.

My Lords, I own I am prepared to hold that mere delay in the absence of fraud, in the absence of a provision making time of the essence of a contract, will not rescind a contract such as we find in these articles of copartnership, and, above all, mere delay will not have that effect when the delay is accounted for, as it seems to me that it can be and is accounted for here, and shewn to have been either necessary for the realisation of the sum which had to be paid, or, at all events, of very considerable benefit to both of the parties concerned; because, although I entirely agree with the observations that were made, and I think it is a just inference from the evidence in this case, that it was highly convenient for the surviving partners that these payments should not have been made at the time stipulated for in the articles of partnership, I cannot but draw the conclusion, from the facts before your Lordships, that it was also for the real interest of all the *cestuis que trust* that payment should not be forced at the day actually stipulated for. But, whether it was convenient or whether it was not convenient, it appears to me that the contract is not rescinded by the delay in the absence of any circumstances of fraud or any special circumstances upon which the rescission of the contract could be founded.

I, therefore, humbly suggest to your Lordships that you should affirm the judgment of the Lords Justices, and dismiss, with costs, the appeal in this case.

LORD HATHERLEY:—

My Lords, in stating my concurrence in the decision at which my noble and learned friend on the woolsack has expressed his desire that your Lordships should arrive, I shall conform most

readily to the suggestion he made, that not one word should fall from any of us tending to cast the slightest doubt upon the well-established principle that no trustee can be allowed to make one pound of advantage out of the trust money which is committed to his trust, with a view to the profiting himself at the expense of his *cestui que trust*, or at the cost of putting trust property in jeopardy in order that he may profit by the use he makes of it. I will not say one single word to detract from the somewhat strong expressions used in the case of *Piety* v. *Stace* (1), or from those used in the later case of *Docker* v. *Somes* (2), in both which cases the learned judges before whom matters of this description arose with reference to the employment of the money of *cestuis que trust* in partnership or business transactions, have thought it right, with some degree of force and vehemence, almost passing beyond the ordinary bounds of judicial expression, to mark the decided course that the Court of Chancery will always take in keeping a trustee strictly in bounds with regard to dealing with the money committed to his trust.

But, my Lords, we have in this case circumstances in themselves of a peculiar character, and such as I do not recollect to have met with in any other case brought before our attention, among the numerous cases that have been cited at the Bar. In the very opening of the case, I think Mr. *Kay* felt the difficulty of dealing with the completed contract (executory only with regard to certain details in order to carry it into full effect) contained in the articles of partnership for the sale of the whole interest and share of any predeceasing partner to the surviving partners. He endeavoured to compare this case from the first with *Willett* v. *Blandford* (3), and to represent it as a case in which an option was offered to the surviving partners to become the purchasers of their deceased partner's share; and on the non-compliance of the surviving partners with the terms and conditions which were expressed with reference to the purchase, he endeavoured to argue that they had declared their option and had expressed their intention in fact of not becoming purchasers, and that they were to be treated from thenceforth as merely in the condition of ordinary surviving

(1) 4 Ves. 620. (2) 2 My. & K. 655.
(3) 1 Hare, 253.

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partners. And one of those partners being also himself a trustee or executor of the deceased partner's estate, he said the case fell within the simple rule enunciated in *Piety* v. *Stace* (1), which has been adopted and followed in so many subsequent cases. This was his first difficulty.

Now, it is quite plain from the partnership articles that the very circumstance was provided against which arose in *Cook* v. *Collingridge* (2) and other cases of that description, and which created so much difficulty in the case of *Crawshay* v. *Collins* (3), namely, the dealing with the assets of a deceased partner, and improperly making use of his money after his death, instead of winding up the partnership, thereby occasioning great confusion, necessarily, in unravelling all the proceedings which during a course of years had been taken by the surviving partners. I say it is quite plain from these partnership articles that in order to avoid that very difficulty the partners in this case carefully stipulated that there should be no question whatever of a mixture of accounts on the part of the deceased partner with those of the surviving partners, or the continuing partnership; and they for that purpose, in terms which I will not now read in full, but which are clearly and plainly set out, laid down a complete method of ascertaining the share of the deceased partner, and added an equally complete direction that the other partners should become purchasers, in so many words, of the share of the deceased partner, in the manner which was therein mentioned and specified.

That manner was a very simple one, and ought not I think in this case to create any difficulty whatever. It was that the share of the deceased partner should be taken to be that which it was found to be on any 30th of June immediately preceding his decease, with certain directions in case he should die before the 30th of June, or after that date, when what was to be done was very carefully described. Taking his share at that rate, certain arrangements were made for his having a sum, not by way of profits (it is carefully provided that it should not be in that form), but a certain amount of interest "in lieu of profits," if he survived the 30th of June by so many months, and a certain larger sum if

(1) 4 Ves. 620. (2) Jac. 607.
(3) 15 Ves. 218; 1 Jac. & W. 267.

he survived the 30th of June by so many months more, and so on. Every care is taken to prevent the necessity of having any farther account whatever as between the deceased partner and the surviving partners in the co-partnership.

The mode of ascertaining a deceased partner's share being that it shall be taken as of the value of which it was found to be on the 30th of June preceding the decease, it did so happen in this case that the first 30th of June occurred in the testator's lifetime (that was the 30th of June, 1854), and the account was taken and entered in the books, as I understand, in his own handwriting. It is not, however, material whether it was entered in his own handwriting or not, it was entered in the books, though not signed by the partners; and there can be no doubt about his having been bound by that first account. He died in July of the subsequent year, and the account of the 30th of June of that year had not been at that moment made up and entered in the books, nor is there any evidence that any such account had been shewn to him or approved of by him; but according to the evidence of the executor who was also a partner, Mr. *Henry Vyse*, the preparations were made for this account—and not only were the preparations made, but, he says, the valuations which were necessary took place—during the testator's lifetime; at a time, therefore, before Mr. *Henry Vyse* was in a position in which his interest in the least conflicted with his duty. He was simply in the position of a partner and brother of the testator. He says the accounts were "worked out" after the testator's death.

That being so, my Lords, let us see whether any difficulty could really and seriously arise in an account of that description in the absence of fraud. When you look at the items which are contained in the account, which is called a sort of balance-sheet, though it is not actually balanced in the paper that was sent to the Plaintiff upon her demand for information on the subject; looking, I say, at the liabilities on the one side and the assets on the other, you will find that there are very few matters indeed which required any special valuation or assessment, or appraisement (the latter is the word that has often been used) with regard to their amount. There are the debts in the ledgers, £18,623 10s. 7*d.*; all that would have to be done with the debts would be to select those

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which were considered bad or doubtful, and distinguish them from the total amount of debts, in order to estimate that particular asset properly. Then there is the value of certain premises where the business was carried on, which are expressly directed by the articles never to be put at a higher value than that at which they were entered in the first balance-sheet, and which seem here to have been put at the same value. Then there is the *New York* balance, £130,340, being in itself nearly half the whole amount of the assets. That, no doubt, was made out in *New York*, and is not pretended to have been made out by Mr. *Henry Vyse*, who is executor here in *England*. No doubt it is brought over from the *New York* books. There is a smaller amount of a similar character from *Prato*, and then there is "Stock in hand £5622," which is another item that would require appraisement. The debts and the stock in hand, I think, may be said to be the only items that would require anything in the way of appraisement or valuation. Then the allowance on book debts on the other side is put at £870; and there are some marks against the following item which I suppose mean ditto. If so, that item means allowance for chance of bad bills £308 3*s*. Those two items amount together to £1178, which is the total amount of the two allowances in respect of debts.

It is enough perhaps to say, as the noble and learned Lord who has preceded me has said, that there is really no challenge whatever of those accounts as being wrongly or improperly made by Mr. *Vyse*, the executor, at the time when he was not executor, and when they were entirely, as he calls it, completed and "perfectly worked out;" that, I think, is his expression. There is no such charge. There is merely the general vague charge which one finds in almost every bill of this description, that if a full account were taken there would be a great deal more found to be due. But that is not the way to challenge or impeach an account on the ground of irregularity or fraud. Therefore I must take this case as being one in which there is not even an allegation of impropriety, and the case must rest solely on the general assumption which the Court of Chancery most properly makes, that a man who is acting in a position in which his duty may conflict with his interest is not to be allowed to say, "I did nothing wrong;" but

the Court will jealously scrutinise all that he does, and will take care to see that his duty has been performed, in case there is any reasonable degree of doubt thrown upon the subject.

But, my Lords, in this case there is really no doubt whatever. The agreement is for the purchase of the testator's interest; and if you compare this account or balance-sheet with the balance-sheet of the preceding year, it shews very few items which would admit of anything like duty conflicting with interest in the valuation. And in the absence of any specific charge to that effect, it is not a case in which, with items of this description and of this magnitude, the Court will take on itself to say that that which was the main object of all the parties to the partnership articles should be frustrated and rendered wholly inoperative, because one of the parties to the arrangement has been made, by another party, who happened to be the predeceasing partner, his executor, and has therefore been placed in a position of difficulty with regard to making up the accounts. I apprehend that the Court can place perfect confidence in this account. It was made up (as it is sworn) on the principles on which the former account was made up during the lifetime of the testator; and, as one sees on the very face of it, there is a very small amount of items upon which there would have arisen any possible question if such a question had been raised, which it has not been.

Now what was the intent of the articles? It was the sale of the business to the surviving partners in order to preserve the business. It was a family business in which the testator had been engaged with his brothers, and, like all the other partners, was most anxious that the business should be preserved, and that it should not be broken up or destroyed. Yet the argument urged upon us is that, from the circumstance of his having made his brother his executor, he put things in such a position that the whole arrangement must necessarily go off because no valuation could be made. It is quite idle to deal farther with that part of the case as to valuation.

But now comes the question with regard to the money not having been paid within two years, which was the appointed time for the payment of the money found to be due to the deceased partner. Bearing in mind that the manifest intent of

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the partnership articles is that this shall be a continuing business, and that it shall not be a business which will be put an end to by the death of one of the partners, but that that partner's share shall be taken, for the express purpose of continuing the business, by the surviving partners; bearing that in mind, I say, and seeing nothing whatever upon the face of the whole transaction which can lead one to infer that time was of the essence of the contract, we have to ask ourselves whether the contract is to be at an end if it is not performed at the time named, that is, at the end of the two years. There is nothing which would justify a Court of Equity in so holding. The effect of that argument would be simply to annihilate the contract on the ground of time being of the essence of it, and to say, True it is we could not in any other shape, perhaps, deprive you of the profits of the business, which it was contracted and stipulated you were to have, on the decease of any one of the partners, upon paying his share—we could not do that directly—but because the money was not paid down *ad diem*, and because the testator happens to have made you his executor, we will take from you, with the one hand, that which the contract gives you, and say that because you have allowed this money to remain in your possession one minute (as Lord *Alvanley* expresses it in *Piety* v. *Stace* (1)) after the time at which it should have been paid, you as executor are to be fixed with those profits which, *quâ* partner, you would be entitled to if time were not of the essence of the contract. My Lords, I do not know of any authority which would justify your Lordships in coming to that conclusion, or in destroying this contract because the precise time for the payment has not been observed.[1]

My Lords, if there had been any appearance whatever of fraud, or any appearance whatever of an attempt to obtain undue advantage by the non-payment of the money; if there had been any appearance of the non-payment of the money having arisen from any other than natural causes, and causes which would have induced the Court of Chancery, if the matter had been before it, to say that it was for the benefit, not only of those retaining the money, but of all parties, that time should be given for the farther completion of the contract, because the realization of the

(1) 4 Ves. 620.

assets was better secured by the business being carried on in the manner in which it was carried on, regard being had especially to that considerable asset, amounting to about £100,000, which I have referred to, as to which there is evidence that it could not have been got in in anything like the time specified, namely, the two years, then the principle might have been applied, and properly applied, which has governed other cases where executors have, for their own benefit, retained money in their possession, and employed it for their own business, at the expense of their *cestui que trust.*

But in this case, my Lords, I think, on the one hand, there is nothing which would justify us in saying that time was so far of the essence of this contract that if it is not performed at the time specified the contract should be utterly broken and destroyed. And I think, on the other hand, there is nothing which shews us that in so extending the time there has been any attempt on the part of the executor to obtain an undue advantage, or to do anything else except to find the best mode of paying this heavy debt, not only for the advantage of the partners themselves, but also for the advantage of those persons who were to to be paid, and who, in order to obtain their money, as far as they were able, would gladly have waited to have the debt liquidated in the manner in which it has been liquidated, which has been a very advantageous manner to the persons to whom the money was due, namely, by the payment of the debt with compound interest. In the absence of any such evidence of impropriety of conduct on the part of the executor, I apprehend that this is not a case, my Lords, in which you can safely act on any extension of the rule which has been referred to; and such an extension, I apprehend, it would be, if you were to say that, simply in consequence of the money remaining where it was under the original contract, but beyond the period fixed by the original contract, you are thereupon to fix the consequences of the continuance of the partnership upon the executor, and to take from him all the benefit of that contract which he has entered into, and which, so far as we can see, he has successfully carried into effect for the benefit of all parties concerned.

I therefore concur in the conclusion to which my noble and

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learned friend on the woolsack has advised your Lordships to come.

With regard to the £1600, I think that is placed out of the discussion by the offer which was made before the Lords Justices and not accepted.

LORD SELBORNE:—

My Lords, the Appellant's counsel in opening his case did not impeach, in the first instance, the balance-sheet of 1855 as having been arrived at in an improper manner; but when the Respondent's counsel mentioned the fact that that balance-sheet was not completely made out in the testator's lifetime, a doubt did at first occur to me whether, having regard to the element of valuation which was involved in it, this might not affect the finality of the contract for the sale of the testator's share in the business to his co-partners contained in the deed of 1853. That doubt, however, was in the farther course of the argument completely removed. It is to be borne in mind that the valuations which entered into that balance-sheet were only of particular items in the general stock, taken *inter socios*, and not of the testator's interest as between himself and his co-partners for the purpose of a contract of purchase.

The evidence as to the time and manner in which those items were valued, is that contained in the statement of Mr. *Henry Vyse*, the executor, who says: "The house has existed for about eighty years. I joined it in 1838. During all that time the annual valuation of the partnership assets has been carried out in the same way. The valuation of 1855 was conducted exactly in the same way as it had been in previous years, and in the same way as had been followed by the testator in his lifetime. The valuation for 1855 was a regular and proper valuation. The actual valuations for that year were made in the lifetime of testator though not worked out before his death."

My Lords, this valuation was a thing which it was the duty of the partners, according to their partnership articles, to make at the time and in the manner in which it was made; and I think that, according to the true conclusion to be drawn from the evidence, it was made at the proper time and in the proper manner by one partner for all the firm; and no error in it being shewn, or

suggested, I think that consistently with sound principles, and with the case of *Coventry* v. *Barclay* (1), it was sufficiently made to fix the amount of the purchase-money payable according to the terms of the contract.

That being so, my Lords, we have to consider what the contract was. It was a contract which, as to the other partners who were not executors, gave them the full rights of purchasers jointly with the executor, in a manner which the executor could have no right or power whatever to alter or interfere with. They became mere debtors, and the executor was only joint debtor with them to the testator's estate for the purchase-money; the whole business and the whole property becoming their own, and no lien being by the contract reserved upon it in favour of the testator's estate, at all events not specifically. That being so, it appears to me to be quite impossible, that, so long as that was a debt bearing interest at 5 per cent. as between the estate and some of the joint debtors, it could have any other or different character as to the other joint debtor, and unless the delay which happened altered the original relation of vendor and purchaser, of debtor and creditor, resulting from the contract, that original relation must continue, and must continue as to the one partner who is executor, as much as with respect to the others who are not.

The question therefore really is, whether from mere delay, under the circumstances of this case, in the payment of the debt your Lordships can infer either (as my noble and learned friend on the woolsack put it) rescission or repudiation of the contract of purchase, or, on the other hand (as I would put it), a new contract of forbearance, equivalent to an agreement to lend the money *de novo*, as if it had been paid to the executors, and then lent back again. I am far from saying that cases might not be supposed in which you might come to the one or the other of these two conclusions; but I quite agree with what has been said by my noble and learned friend on the woolsack, that from mere delay in payment, under the circumstances, of such a joint debt as this, due from an executor and strangers to the executorship, under a contract made by the testator himself, you ought not to draw any such inference.

(1) 33 Beav. 1; 3 De G. J. & S. 320.

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My Lords, the only case which was referred to, which, as it appeared to me, involved circumstances at all similar to these, was the case of *Jones* v. *Foxall* (1). What was actually done by the decree in *Jones* v. *Foxall* (1) prevents that case from being an authority, as far as the decree goes, for the proposition for which it was cited, because the trustee there being bound by the terms of his trust to call in the debt at a particular time, and being also bound, by reason of the infancy of the *cestui que trust*, to accumulate the income of the trust fund for the benefit of the infant Plaintiff, was charged with compound interest, which the very existence, and neglect, of the obligation to accumulate, might make perfectly proper. It may, indeed, be inferred, from some expressions in the judgment, that the late Master of the Rolls did in that case think that there might have been a right on the part of the *cestui que trust* to claim the profits made by the use of the money, in the business in which the executor was a partner, to the extent of the executor's share of those profits, if that had appeared to be more for the advantage of the *cestui que trust*. My Lords, with very great respect and deference to that noble and learned Lord (if he was of that opinion), I am not prepared to treat that *dictum* in *Jones* v. *Foxall* (1) as an authority which ought to govern the decision of the present case, or of any other case similar in its circumstances.

The circumstances of *Jones* v. *Foxall* (1), as I recollect them, were simply these:—There was a common loan of small amount by the owner of the money to certain bankers, at 5 per cent. interest, and afterwards a trust of that debt, so due from the bankers, was constituted, one of the partners in the bank being made the trustee; and undoubtedly it became his duty, at a certain time fixed by the trust deed, to call in the money, which duty he did not perform. As far as the other partners were concerned, they were not treated as in any way otherwise liable, by reason of what had taken place, than they had originally been as mere debtors. I cannot agree that, in those circumstances, the liability of the trustee, who was a partner in the bank, to account for profits made by the use of this money in the banking business after the time when he ought to have called it in, could have been established,

(1) 15 Beav. 388; 21 L. J. (Ch.) 725.

his co-partners not being liable. There was a different ground, entirely depending upon the terms and nature of the trust itself, on which the trustee might be (as he was) charged with compound interest; and it may be that, independently of anything in the particular nature or terms of the trust, a trustee who suffers money, which he ought to call in, to be used in a business in which he has an interest, may be chargeable with compound interest. Of that I say nothing. But, my Lords, that being the only authority cited, as a case the circumstances of which at all resemble the present, I must say that, unless the case can be distinguished on some ground, of which I am not at present aware, I cannot agree with what seems to have been the view of the Master of the Rolls on that point. And, not agreeing with what was there said, (if it was intended to bear that meaning,) I know of no other authority which could be reasonably referred to in support of the argument of the present Appellant.

My Lords, I entirely agree in other respects with what has fallen from your Lordships with regard to this case.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 14th July, 1874.

Solicitor for the Appellant: *S. J. Robinson.*
Solicitors for the Respondents: *Gregory, Rowcliffes, & Co.*

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THE LIQUIDATORS OF OVEREND, GURNEY, & CO. (LIMITED) . . . . . } APPELLANTS;

AND

THE LIQUIDATORS OF THE ORIENTAL FINANCIAL CORPORATION (LIMITED) . } RESPONDENTS.

Bankers—Bills—Principal and Surety.

6 Affirm 5. 12

If, after a right of action accrues to a creditor against two or more persons, he is informed that one of them is a surety only, and, after that, he gives time to the principal debtor, without the consent and knowledge of the surety, the rule as to the discharge of the surety applies.

McH. brought to *O. & G.* (a discount company) certain bills, which bore on them the acceptances of the *F. Co.* *McH.* was in fact the agent of the *A. & G. W. Co.* (an American company), and he and this American company had obtained the acceptances for their own accommodation, and on payment of a commission in respect of such acceptances. The bills were not paid, but renewed. *McH.* gave the *O. & G. Co.* his own guarantie and that of the American company that these renewed bills should be paid at maturity. These renewed bills were not paid. The *O. & G. Co.* gave, on the 6th of April, 1866, notice of dishonour to all the parties whose names were on the bills. On the 9th of April the solicitor of the *F. Co.* gave full information to the *O. & G. Co.* that *McH.* was the real principal on the bills, which had been accepted by the *F. Co.* merely for his accommodation. The manager of the *O. & G. Co.* said he should see *McH.* in the afternoon. *McH.* afterwards gave, as collateral security, to the *O. & G. Co.* bills to a much larger amount, drawn on one *L. L.*, and the *O. & G. Co.* entered into an arrangement with *McH.* not to sue on the old bills if the bills on *L. L.* should be paid. Nothing farther was done in the matter for some months. These last bills were not paid, and the *O. & G. Co.* afterwards brought an action against the *F. Co.* to recover the amount of the bills originally accepted by the *F. Co.* The *F. Co.* filed a bill to restrain the action :—

Held, that under all the circumstances, the action must be restrained, for that the *O. & G. Co.*, with a knowledge of the real character of the *F. Co.*'s acceptances, had given time to *McH.*, whom they knew to be the real principal on the bills, and had so discharged the *F. Co.*

Merely giving of additional security, by a principal, will not discharge a surety, but if the giving of such security is really a consideration for giving time to the principal, it will do so.

Semble, that to reserve a creditor's right against a surety there must be a distinct expression of intention to reserve it.

A promise to pay on demand bills, upon their reaching maturity, given, not upon the face of the bills themselves, but by a collateral writing, is binding to all intents and purposes on the giver of it.

THIS was an appeal against a decree of Lord Chancellor

Hatherley, made in a suit which the present Respondents had instituted against the present Appellants, in order to restrain these Appellants from prosecuting an action at law against these Respondents to recover the amount of four bills of exchange, on which the names of the Respondents appeared as acceptors. The facts of the case are set forth in detail in the report in the Court below (1). The following is the summary of them necessary for the present report.

James McHenry, who, it afterwards appeared, was the agent in this country for the *Atlantic and Great Western Railway Company*, had discount dealings with *Overend, Gurney, & Co.*, and in June, 1864, obtained from them discount for bills amounting to £10,000, drawn by *Léon Lillo*, of *Paris*, on and accepted by the Respondents. These bills formed part of a series of bills to a much larger amount, which the Respondents had agreed in like manner to accept on receiving a commission of 4 per cent. These bills were not paid, but they were from time to time renewed, and *Overend & Gurney* took the renewals. On the 9th of January, 1866, the last renewed acceptances of the Respondents fell due, and *McHenry* gave to the Respondents a cheque on the Appellants for £10,000, and the Respondents then accepted four bills of exchange for £2000, £2000, £3000, and £3000. These bills were drawn on the Respondents, not by the former drawer, *Léon Lillo*, but by *Emile Deschamps*, of *Paris*.

They were dated the 22nd of January, 1866, and were to become due three months after date. They were on the same day deposited by *McHenry* with the Appellants, and he gave the Appellants a written guarantie in these terms:

"*City Office*, 23, *Throgmorton Street*, *E.C.*
"*Atlantic and Great Western Railway*,
"5, *Westminster Chambers*, *Victoria Street*, *Westminster*, *S.W.*
"*London*, 9th January, 1866.

"Messrs. *Overend, Gurney, & Co.* (*Limited*).

"Gentlemen,—In consideration of your agreeing to discount the bills of *Emile Deschamps* on and accepted by the *Oriental Financial Corporation* (*Limited*), for £10,000, due as per list at foot, I hereby agree to guarantee and indemnify you from all loss

(1) Law Rep. 7 Ch. Ap. 142.

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that you may incur by so doing; and in the event of same not being duly paid at maturity, I hereby engage to pay the amount of said bills on demand, and for the above-mentioned consideration, I hereby give the guarantie of the *Atlantic and Great Western Railway Company* for the said bills for the said terms and conditions," &c. Signed by *W. B. Ford* for *McHenry*.

The list of the bills was then given. They were all to fall due on the 6th of April, 1866.

In the course of March, 1866, *McHenry* had some interviews with Messrs. *Birkbeck* and *Henry Edmund Gurney* (managing the business of *Overend, Gurney, & Co. (Limited)*), with whom he had other money transactions to a large amount, and he deposited with them shares of the *Atlantic and Great Western Railway Company* to the amount of $445,000. The agreement that was then arrived at between the parties was not reduced into writing, and was, in this suit, differently represented by Messrs. *Birkbeck* and *Gurney* on the one hand, and by *McHenry* on the other.

The bills on coming to maturity on the 6th of April were dishonoured. Notice of dishonour was given by the Appellants to all the parties whose names were on the bills, and among the rest to the Respondents, whose names appeared as acceptors. On the 9th of April Mr. *Farmer*, the solicitor of the Respondents, called at *Overend & Gurney's (Limited) Bank*, and informed them that the bills had been accepted by the *Financial Corporation* for *McHenry's* accommodation and benefit, and must be paid by him. The answer that Mr. *Farmer* received was that the managing director would see Mr. *McHenry* in the course of the day.

On the 27th of April *McHenry* went to the Appellants, who were then largely in advance to him, and had a meeting with Mr. *Birkbeck* and Mr. *Gurney*. *McHenry* delivered to them bills to a very considerable amount, among which were bills on *Lillo* for £38,000, and an agreement was come to between the parties. What that agreement was, occasioned much discussion in the cause, but the Lords in their judgments adopted ultimately the statement of it as made by Mr. *Birkbeck*, which, as to the four bills now in question, was to this effect: "That the said four bills for £3000, £3000, £2000, and £2000 should be held over during the currency of the bills on *Léon Lillo* for £38,000 given as

additional security. The four bills on the Plaintiffs' corporation (1) were then unpaid in the hands of the Defendant company (2), and therefore could not be retired by them."

Both companies, the *Overend & Gurney Company* and the *Financial Corporation*, went into liquidation. On the 29th of October, 1867, payment of these bills was demanded by the liquidators of the *Overend & Gurney Company* from the liquidators of the *Oriental Financial Corporation*, but liability on them being denied, an action was brought by the Appellants in February, 1868, to recover the amount. In March, 1868, the Respondents filed a bill in Chancery to restrain this action, on the ground that they were mere acceptors for accommodation of *McHenry*, and that he was the principal debtor; that notice of those facts had been given to *Overend & Gurney*, who by their arrangement with *McHenry* of the 27th of April, 1866, made after such notice, had in fact released them from all liability on the bills. Evidence was taken on both sides, and in June, 1871, Vice-Chancellor *Malins* made a decree whereby the bill filed by the liquidators of the *Financial Corporation* was ordered to be dismissed. On appeal, to Lord Chancellor *Hatherley*, this decree was reversed (3). The case was then brought up to this House.

Sir *J. Karslake*, Q.C., and Mr. *Stewart Ferrers*, for the Appellants:—

The Respondents were the acceptors of these bills, and were therefore primarily liable upon them. There was no proof whatever that they were merely sureties, and there had been nothing done which in any way released them from their liability as acceptors. *McHenry's* name was not upon any one of the bills, so that he was not directly a party to them. His deposit of additional security with the holders of the bills was nothing but the act of one who was, in law, a stranger to the transaction, for the benefit of those who were parties to the bills. What he did therefore could have no effect on the legal rights and liabilities of those whose names were upon the bills. An agreement to take additional security from *Lillo*, and in the meantime not to sue on the

(1) The present Respondents.
(2) The present Appellants.
(3) Law Rep. 7 Ch. Ap. 142, in a note to which the previous judgment of Vice-Chancellor *Malins* is given.

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bills, was an agreement for the benefit of the acceptors—and that was the real character of the arrangement of the 27th of April—and could have no effect in releasing the original acceptors of the bills. The rights against the sureties were here reserved, and where that was done even a release of the principal would not operate to release the surety. The arrangement with *McHenry* was a mere arrangement for the convenience of all parties, but especially of the acceptors. It left things exactly as they were before. *Price* v. *Barker* (1) was a much stronger case than the present. The creditor there gave to the principal debtor a deed-poll not to sue him, but that was held not to be a release but only a covenant not to sue, and the creditor was held not to be precluded from suing the surety in respect of breaches of a joint bond accruing before the execution of a deed-poll.

Even on the assumption that *McHenry* was the principal (though nothing on any of the documents shews him to be so), there was no arrangement not to sue him; there was merely an arrangement that if *Lillo's* bills were paid the *Financial Corporation* should not be sued. That was a benefit conferred on that corporation. Taking additional security, which *Lillo's* bills were, with a view to the relief of that corporation, could not release it from its original liability.

There was no real notice to the Appellants as to the actual position of these parties—on this point *McHenry's* evidence was not in accord with that of Messrs. *Birkbeck* and *Gurney*—but even if there had been, such notice being conveyed to them long after they had taken the bills, as bills accepted by the Respondents, they could not have their original rights affected by it. The Appellants were indorsees for value, and even after notice subsequently given, might release the drawer without releasing the acceptor: *Ex parte Graham* (2). The liability of the acceptors had attached, and they could not be released. *Oakley* v. *Pasheller* (3) was not in point, for there the original creditor had himself, with a full knowledge of all the facts, given time to the original debtor. Nor could it be properly argued that *Oakley* v. *Pasheller* (3) was at all in contradiction to *Ex parte Graham* (2).

(1) 4 El. & Bl. 760. (2) 5 De G. M. & G. 356.
(3) 4 Cl. & F. 207; 10 Bli. 548.

Mr. *Cotton*, Q.C., and Mr. *Jason Smith*, for the Respondents:—

Anything which releases a principal from his liability must release his surety also. It is said that here time was given to the surety, and that that did not release him. The fact is denied. The agreement not to sue on the original bills till it was known whether certain other bills, which were in fact substituted, were paid, was an agreement to give time to the principals on the first bills, and that agreement was made with *McHenry*, and for his benefit, he being known at that time to the Appellants as the real principal debtor. This case falls within the principle of *Belshaw* v. *Bush* (1), where the taking bills in respect of a simple contract debt was held to release the original debtor on the contract, the original creditor having indorsed the bills to *C. D.*, who, as the holder of the bills, was entitled to sue the acceptor of them. That shewed that the taking a bill which has time to run is a conditional payment of the debt in respect of which it is given, and that was what had been done here. The bills here were not taken as additional security, but as something which was to prevent or delay suit on the other. That was therefore a discharge of the surety on the original bills. *McHenry* was to pay on his guarantie if the substituted bills were not paid, and on that condition the original bills were not to be sued upon. That was a giving of time to the principals on those bills, the Respondents being at that moment known to the Appellants to be mere sureties upon them. And this agreement was made without any condition that could reserve the right of the surety against the principal.

Sir *J. Karslake*, in reply.

THE LORD CHANCELLOR (Lord *Cairns*):—

My Lords, the bills of exchange out of which the proceedings in this suit arose were four in number, and amounted in value to the sum of £10,000; and I will ask your Lordships, in the first place, to observe the position of the persons who are liable upon the face of those bills of exchange. In form, the bills of exchange were drawn by a person, apparently a native of *France*, of the

(1) 11 C. B. 191; 22 L. J. (C.P.) 24.

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name of *Deschamps;* and they were drawn upon, and accepted here by, the *Oriental and Financial Corporation.* The bills drawn and accepted in this way, were drawn for the purpose of being used by a gentleman of the name of *McHenry*, who was a defendant in the original suit, and who appears to be the agent in this country for a railway company across the *Atlantic*, and these bills were obviously drawn, and their acceptance was obtained, for the purpose of having the bills used in the financial arrangements of that transatlantic railway company.

My Lords, the bills so drawn and so accepted were taken to the firm of the *Overend & Gurney Company* for the purpose of discount, and they were discounted by that firm; but at the time of the discount, and along with it, there was given by *McHenry* to this firm a guarantie, to the wording of which I will now direct your Lordships' particular attention. It is signed by a Mr. *Ford*, by procuration, for *McHenry*, and addressed to Messrs. *Overend, Gurney, & Co.* It runs in these words:—"Gentlemen,—In consideration of your agreeing to discount the drafts of *Emile Deschamps* on, and accepted by, the *Oriental Financial Corporation* (*Limited*) for £10,000, due as per list at foot, I hereby agree to guarantee and indemnify you for all loss that you may incur by so doing, and in the event of same not being duly paid at maturity, I hereby engage to pay the amount of said bills on demand; and for the above-mentioned consideration I hereby give the guarantie of '*The Atlantic and Great Western Railway Company*' for the said bills for the said terms and conditions." This guarantie was, as I have stated, given to *Overend, Gurney, & Co.* upon the occasion of the discounting of the bills.

Now I will assume, for it is stated by the directors of *Overend, Gurney, & Co.* positively, and it is not denied, that in January, 1866, the time of the discounting of the bills, they were not aware of any relationship between the parties to the bills and *McHenry* which would impart to them the knowledge of *McHenry* being the principal, and the *Financial Corporation Company* being the surety. But, in point of fact, your Lordships find that that was the relationship between the parties. The giving of these bills of exchange, the drawing of them, and the acceptance of them, were for the benefit of *McHenry* and his principals. *McHenry* was

bound to provide the funds for the payment of the bills as between himself and the acceptors; and the relationship of principal and surety plainly existed between the parties.

That being the position of the parties, the bills of exchange became due on the 6th of April, 1866, and they were not paid at maturity. Notice of this fact was given to all the parties concerned: it was given to *McHenry*, it was given to the drawer, and it was given also, although that perhaps was unnecessary, to the acceptors. That notice was given apparently about the 9th of April, and I find that on the 9th of April the persons constituting the *Oriental Financial Corporation* informed *Overend & Gurney* of the exact position in which they stood as to *McHenry*. I will direct your Lordships' attention to the evidence on that point, because it is given in one affidavit, and is not the subject of any contradiction or of any dispute. *Farmer*, in his affidavit, says: "On the 9th of April I called at the place of business of *Overend & Gurney;* I saw one of the managing directors (whom I believe to be Mr. *Birkbeck*), and after stating to him that certain bills, namely the bills in question, bearing the acceptance of the Plaintiffs in the cause, in respect of which *Overend, Gurney, & Co.* had claimed payment from the Plaintiffs, were accepted by the Plaintiffs merely for the benefit and accommodation of *McHenry*, and that such bills ought to have been paid or provided for by him at maturity, and referred the Defendants, the company, to him with respect to the payment of the said bills of exchange, and the managing director informed me in reply that he should probably see *McHenry* in the course of the afternoon of the same day." Therefore, my Lords, at that time, which was three days after the maturity of the bills, *Overend, Gurney, & Co.* were distinctly and clearly informed that, upon and in respect of these bills, the *Financial Corporation* stood in the situation of surety only, and that the person primarily liable to provide for the bills was *McHenry*.

But your Lordships will observe that it was not merely a formal intimation of this kind which was given to *Overend, Gurney, & Co.* It was an intimation which was accepted and acted upon by them, because the managing director stated that he intended to see *McHenry* on the same day upon the subject; and your Lordships

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have it in evidence that from that day, the 9th of April, 1866, until the 5th of November, 1867, no application whatever on the subject of these bills was made to the *Financial Corporation*. *Overend, Gurney, & Co.* seem to have thoroughly understood the position in which *McHenry* stood towards the *Financial Corporation*, as the person who was bound to provide for the payment of the bills.

Now, my Lords, that relationship having existed between the parties, and having thus been clearly brought to the notice of *Overend, Gurney, & Co.*, your Lordships will, I think, find that the decision of this case will turn upon a very short examination of certain facts which took place upon a subsequent day, the 27th of April, 1866. On that day there was a meeting between Mr. *McHenry* and two of the directors of *Overend, Gurney, & Co.*, Mr. *Gurney* and Mr. *Birkbeck;* there was apparently no person else at the meeting. The evidence which is given by Mr. *McHenry* upon the subject of what passed at that meeting, whether from confusion of mind or from want of memory, is so vague, and obviously so inaccurate, that I think both parties at your Lordships' Bar agreed in placing no reliance upon it; and it is clearly evidence which cannot be accepted as a correct narrative of what took place. On the other hand, the evidence of the two directors of *Overend, Gurney, & Co.* is completely consistent in all its parts, and the Appellants at your Lordships' Bar must of course have their case judged, and, indeed, are content to have their case judged, by the statement that those two gentlemen give as to what took place upon the day in question.

Now what is stated by these gentlemen may be taken from the affidavit of one of them, the affidavit of Mr. *Birkbeck*, who says: "I deny the following statement contained in the 10th paragraph of" *McHenry's* answer, "namely that 'it was also agreed between me' (meaning *McHenry*) 'and the managing directors, that in consideration of such deposit the Defendants should retire the four bills of exchange for £3000, £3000, £2000, and £2000 accepted by the Plaintiffs as aforesaid, and also (to the best of my recollection and belief) the acceptance for £3000 re-discounted by the Defendants, the company, for the *Joint Stock Discount Company* as aforesaid,' or that it was agreed between *James McHenry* and me this deponent to any such or the like effect." Your Lordships will

observe that Mr. *Birkbeck* denies a statement which had been made by *McHenry*, and then he replaces that statement by his own narrative of what was done. He says: "I say that the agreement was that the said four bills for £3000, £3000, £2000, and £2000 should be held over during the currency of the said bills on *Léon Lillo* for £38,000 given as additional security." Now it is admitted upon all sides that on this day there were given to *Overend, Gurney, & Co.* by *McHenry* these bills of *Léon Lillo* for the amount of £38,000. Those bills were drawn by *Léon Lillo*, but not accepted. And it is also admitted that certain other arrangements were made at the same time which resulted in a part payment of the demand which *Overend, Gurney, & Co.* had against *McHenry*.

And, my Lords, I cannot do better than read, in connection with this affidavit which I have last read, another statement from the same gentleman, Mr. *Birkbeck*, joining in that relation with Mr. *Gurney*. On the 27th of April, 1866, *McHenry* "being unable to take up the last-mentioned bills as well as others which the Defendants held unpaid, proposed to us that the Defendant company should discount £6000 acceptances of *Bailey Brothers*, due on the 12th of August, 1866, against which they had made an advance of £5000, and apply the margin of £1000 towards payment of the said bills for £2000, £2000, £3000, and £3000; and he gave to us, on behalf of the Defendant company, drafts drawn by *Léon Lillo* upon the *Bank of London*," but not then accepted, for the balance.

Therefore, what your Lordships find is that the sum of £1000 was applied, as far as it would go, in part payment, and these *Lillo* drafts were given for the balance. The explanation of the giving of those drafts, and the narrative of what accompanied the giving of them, is to be found in the second affidavit of Mr. *Birkbeck*, which I read first: "the agreement was that the said four bills," for the £10,000, "should be held over during the currency of said bills on *Léon Lillo* for £38,000 given as additional security." Now, my Lords, what is the meaning of these words which really must be taken as the narrative, agreed between the parties, of what took place? What is the meaning of the words, it was agreed that the £10,000 bills "should be held over during the currency

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of the bills on *Léon Lillo* for £38,000?" If those words mean that the agreement between *McHenry* and *Overend, Gurney, & Co.* was that the bills for £10,000 should not be put in suit as against the parties to the bills, namely the acceptors and the drawer, but that *Overend, Gurney, & Co.* should be left perfectly free to proceed against *McHenry* upon his guarantie, then I should be decidedly of opinion that there was nothing in an agreement of that kind which in any way discharged the sureties for the debt, but that the creditor remaining at liberty to sue the principal debtor, there was nothing in the transaction of which the sureties could complain. But, on the other hand, if the meaning of these words is that the agreement was that no proceeding should be taken either upon the bills or upon the guarantie given for the payment of the bills, then it appears to me that the agreement would be one entered into to sue neither principal nor surety, but entered into at the instance not of the surety but of the principal, and was therefore one that would be open to all the vice of an agreement to give time to the principal debtor.

I must, my Lords, repeat, what is the meaning of these words? In point of fact, the names upon the bills of exchange no doubt were the names only of the drawer and of the acceptors; but, as I have just now observed to your Lordships, there cannot be a doubt that these bills were discounted by *Overend, Gurney, & Co.* not merely upon the faith of the names upon the bills, of the drawer and the acceptors, but upon the faith of that guarantie which I have already read. For it not, for what purpose was that guarantie given, and what is the stipulation in that guarantie, "I agree to indemnify you for all the loss that you may incur by discounting the bills, and, in the event of the same not being duly paid at maturity, I engage to pay the amount of the bills on demand"? My Lords, to all intents and purposes, as regarded *Overend & Gurney, McHenry* was exactly in the same position as to those bills as if his name had been found upon the bills as a party to them. He had promised to pay them on demand when they had reached maturity. Although he had given that promise not upon the face of the bills but upon a collateral writing, to all intents and purposes he was bound by whatever might be the fate of the bills.

I therefore repeat that, when your Lordships find that the agreement which, it is admitted, was come to, not at the instance of the sureties of the bills, not at the instance of the *Financial Corporation*, nor of *Deschamps*, but at the instance of *McHenry*, and that during this long period of eighteen months to which I have referred the sureties were taking no steps to shelter themselves from proceedings under the bills, but the only person who was taking proceedings to prevent the bills being put in suit was *McHenry*, and that there was obviously an important end to be gained by *McHenry*, just as much with regard to himself as with regard to the parties to the bills, namely, that the transatlantic railway company should not have its credit endangered by proceedings being taken against him, its agent; when, I say, your Lordships consider those circumstances, it appears to me that you cannot do otherwise than arrive at the conclusion that the agreement, which clearly was everything to him, that the bills should be held over during the currency of the bills of *Léon Lillo*, was an agreement that no proceedings should be taken in respect of those bills either against *McHenry* or against the *Financial Corporation Company*.

And, my Lords, I venture to think that if, after that agreement was entered into, any proceedings had been taken against *McHenry* upon the guarantie, it would clearly have been open to *McHenry* to defend himself against any such proceedings by alleging (whether he would do it in the shape of a legal plea or an equitable plea, by a defence in a Court of Law or by proceedings in a Court of Equity, it is unnecessary to consider) that, whereas the guarantie was a guarantie that he would pay the amount of the bills on demand when the bills reached maturity, the holders of those bills had, at his instance, agreed to defer taking any proceedings upon them, and had agreed that the bills should be held over during the currency of the *Léon Lillo* bills. My Lords, I need not point out to your Lordships that that was a perfectly valid agreement. It was an agreement for good and valuable consideration, and the only question which can arise is as to the construction of those words to which I have referred. In my opinion, the agreement to hold over the bills had the effect of protecting during the continuance of that agreement both the parties

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whose names were on the bills, and also *McHenry* himself, from any proceedings.

Now, my Lords, it is said that this case was not sufficiently alleged in the pleadings. It appears to me that it was the supposition of the Plaintiffs, when the bill was first filed, that the effect of what was done on the 27th of April was at once to put an end to the £10,000 bills by an arrangement under which the *Lillo* bills, and other securities, were accepted as payment. It was found out, as the suit proceeded, that that was not the view taken by *Overend, Gurney, & Co.*, although it was the view of *McHenry* as to what took place on the 27th of April. On the other hand, *Overend, Gurney, & Co.*, through their directors, alleged that what took place was not an agreement to terminate the bills, or to pay the bills, but an agreement to hold over the bills in the way I have described. Thereupon the bill was amended in a manner which, although it may be criticised as somewhat curt and bare in the allegation, is, as it appears to me, sufficient for the purpose in view. "The Plaintiffs charge that even if the agreement was such as the Defendants, the company" (that is, *Overend, Gurney, & Co.*), "allege, the Defendants, the company, at the time they made the same, well knew that the Plaintiffs were sureties only for *James McHenry*, and that the Defendants, the company, by giving time to *James McHenry* without their privity or consent for the payment of the said bills of exchange, have released the Plaintiffs from all liability to pay the same."

Then, my Lords, it was said that the knowledge that the *Financial Corporation* was surety was not obtained by *Overend, Gurney, & Co.* until after the bills became due; and inasmuch as the contract arising out of and connected with the bills was made before *Overend, Gurney, & Co.* had any knowledge of that suretyship, their rights and their powers of proceeding under that contract ought not to be interfered with in consequence of knowledge subsequently obtained. My Lords, it appears to me that after the case which was referred to at the Bar, decided by your Lordships' House, that of *Oakley* v. *Pasheller* (1), it is impossible to contend, if after a right of action accrues to a creditor against two or more persons, he is informed that one of them is a surety

(1) 4 Cl. & F. 207.

only, and after that he gives time to the principal debtor without the consent and knowledge of the surety, that under those circumstances the rule as to the discharge of the surety does not apply.

My Lords, it was then said that at all events you must read the statement made by Mr. *Birkbeck* as to the agreement that was come to, as if it implied that all the rights were reserved by the agreement against the surety; and that, inasmuch as the words with regard to the *Lillo* bills are that they were given "as additional security," the giving of additional security does not discharge in any way the surety.

My Lords, it is quite true that the giving of additional security will not of itself discharge a surety; but if the additional security is given upon a contract to give time, in consideration of this giving of the additional security, then time given under those circumstances, apart from the consent of the surety, is a discharge of the liability of the surety. I cannot find in the words which I have read any reservation of right whatever as against the surety. If I am right in the construction which I have put upon it, it is a voluntary agreement entered into with *McHenry* to sue no person at all for the period of time mentioned. If that is so, it is an agreement not to sue the surety, and there is no reservation of right as against that surety.

My Lords, I certainly think that the conclusion at which the late Lord Chancellor arrived in this case is entirely correct, and I therefore submit to your Lordships that the appeal should be dismissed with costs.

LORD CHELMSFORD:—

My Lords, the only question in this case is one entirely of fact, which is, whether the agreement by *Overend, Gurney, & Co.* with Mr. *McHenry* to hold over the bills upon which he was the principal, and the Respondents the sureties, during the currency of the bills drawn by *Lillo*, involve a giving of time to the principal? The agreement is proved by Mr. *Birkbeck*, one of the Appellants, who states that the agreement was that the four bills should be held over during the currency of the said bills on *Léon Lillo* for

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£38,000 given as additional security. During the course of the argument I certainly entertained very great doubt as to what was the construction of this agreement; but, upon consideration, I am disposed to agree with the view which has been taken by my noble and learned friend on the woolsack, that it amounted to this, that they would not, during the currency of *Lillo's* bills, place *McHenry* in the position of being sued. That being so, it is quite clear that it was a giving time to the principal; and upon this short ground I agree with my noble and learned friend that the decree of the Lord Chancellor ought to be affirmed.

LORD O'HAGAN:—

I can add nothing material to the reasoning by which my noble and learned friend on the woolsack has sustained an opinion with which I concur. The question is a short and a clear one. It is a question as to the construction of a contract contained in a very few words, and is presented to us without any obscurity arising from a conflict of evidence. It seems to me a case without difficulty in law, or doubt as to facts.

The matter stands simply thus: Mr. *McHenry*, the person who entered into the contract, had an interest in it, either on his own account or for those whom he represented—the *Atlantic and Great Western Railway Company*. He came to make the contract and to settle its terms, and by him it was made accordingly. In entering into that contract he procured the making of it for good consideration. He gave additional security, and upon his giving it, the parties with whom he dealt agreed that they would not, for a certain period, sue upon the bills which were at that time in circulation and in their hands. I think it clear, under such circumstances, that the agreement was not to have a merely limited effect, protecting only the persons who had become sureties, but that according to the intention of the parties it was to suspend all action upon the bills, or in relation to them, directly or indirectly, for the period during which it was to operate.

Such being, as I conceive, the meaning of the contract, it seems to me that it would have been a complete breach of it between

Overend, Gurney, & Co. and Mr. *McHenry*, if, during the period of the currency of the bills held by the Plaintiffs, they had taken any step whatever for the purpose of obtaining payment. I think, also, that if the guarantie to which my noble and learned friend on the woolsack has referred, had been sued upon at any time, during that period, it would have been impossible to enforce that guarantie, or to encounter a defence which might have been presented, either in the shape of an equitable suit or a plea at law, relying on the case that there had been, for good consideration, a contract to suspend any action for the recovery of the money affected by the guarantie.

I am, therefore, of opinion that the judgment of the Lord Chancellor ought to be sustained.

Order appealed from affirmed, and appeal dismissed with costs.

Solicitors for the Appellants: *Maynard & Son.*
Solicitors for the Respondents: *Farmer & Robins.*

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June 23, 25; *July* 24.

WILLIAM FORSTER CHARTER . . . . . APPELLANT;

AND

CHARLES CHARTER . . . . . RESPONDENT.

Will—Description—Name—Evidence— Costs.

2 P D. 68. 70
5 C L D. 805.
7 C L D 198.
8 App Cas 612
W N (1876) 172 192
6 P D. 218

Evidence of the declarations of a testator as to whom he intended to benefit, or supposed he had benefited, can only be received where the description of the legatee, or of the thing bequeathed, is equally applicable, in all its parts, to two persons, or to two things. But evidence of the circumstances, the habits, and the state of his family at the time he made the will, is admissible, so as to put the Court in the position of the testator, in order to ascertain the bearing and application of the language which he uses, and whether there exists any person or thing to which the whole description given in the will can be, with sufficient certainty, applied.

Forster Charter, a Northumbrian farmer, made a will in 1859; it was drawn for him, at his request, by the vicar of the parish. The vicar knew, personally, nothing of the testator's family. The testator had had a son named *Forster Charter*, but this son died unmarried while yet under age. The second son, who thereupon became the elder surviving son, was named *William Forster Charter*. In 1850 he left home and settled in business at a place about 100 miles distant. He was never known as *Forster Charter* but was called *William* or *Willie*. In 1853 he went to *Australia*, but returned in 1856. He then resumed his former business at his previous residence, and visited his father only occasionally. It was doubtful whether they were or were not on good terms with each other. The younger surviving son was named *Charles Charter*. He always lived with his father, except for a very short period in 1859 or 1860, when he absented himself on account of a quarrel in the family. On his return he went on as before, assisting his father, the testator, in the farm business till the father died, which was in 1869. The testator had three daughters; two were married and living away. They were not mentioned in the will. The third was unmarried, and lived with her father. Her name was *Barbara*. She was mentioned in the will, but was erroneously called "*Barbara Forster*," though she had never been known by that double name. The testator's residence and farm were, in the will, left to "my son *Forster Charter*," who was made executor. This name and this description were twice repeated. The will went on to provide an annuity for the wife, to be paid "by my executor *Forster Charter*," as long as they should "reside together in the same house"; but "should they think proper to live separately" the "said *Forster Charter*" was to let her live rent free in a neighbouring cottage, and furnish her, in addition to the annuity, with necessary supplies; and in case of any dispute between them as to the supplies, the decision of *W. D.* (a near neighbour and one of the witnesses to the will) was to be final. There was a similar provision as to "*Barbara Forster*." Probate was granted by the provincial registrar to the

Costs of the litigation in the estate of a wife
personal estate being insufficient) her husband
real estate. Charles v C 3 C L D 215 / C B

elder surviving son, *William Forster Charter*. On a citation to recall probate, evidence was received, not only of the state, circumstances, and habits of the family, but of the declarations of the testator as to his intentions with regard to his property:—

Held, that this latter evidence was inadmissible:

Held, by the Lord Chancellor and Lord *Selborne*, that evidence as to the state, circumstances, and habits of the family was here admissible.

And, (*diss.* Lord *Chelmsford* and Lord *Hatherley*), that the evidence of that kind here given had the effect of correcting what was thereby shewn to have been a mistake in the will, *i.e.*, the name of the executor as there written; that the description of what was to be done, of the circumstances under which it was to be done, and of the person who was to act in doing it, of the place where the directions of the will were to be carried into effect, and all the circumstances connected therewith, pointed plainly to *Charles*, who had always been, and then was, resident with his father, as the person intended to carry the provisions of the will into effect; and that a mistake having been made in the use of one Christian name, which the provisions in the will and the evidence, properly admissible, had corrected, the original probate had been rightfully recalled; and that *Charles Charter* was properly and completely shewn to be the person rightfully entitled to the probate.

The difficulty having been created by the act of the testator himself, the costs of both parties were ordered to come out of the estate.

THIS was an appeal against a decision of Lord *Penzance*, by which a probate previously granted had been recalled.

The Appellant was the elder, the Respondent the younger, son of one *Forster Charter*, a farmer, of *Woodburn Hill*, in the county of *Northumberland*. On the 23rd of June, 1859, the testator, *Forster Charter*, requested the Rev. Mr. *Kell*, then the vicar of his parish, to draw up his will. That gentleman, although not personally acquainted with the testator's family, consented to do so. He drew up a will, which appeared to have been executed on the same day when it was drawn up, and of which the following are the important parts:—"I hereby nominate and appoint my son, *Forster Charter*, as the executor of this my will; and to him I give, &c., all my messuages, &c., for his own use and benefit, and for the use and benefit of the persons hereinafter to be named. My will is that my executor, *Forster Charter*, shall annually pay to *Elizabeth Charter*, my wife, the sum of ten pounds sterling, and at the same [time] allow my said wife her ordinary maintenance, as long as they reside together in the same house; but, should they think proper to live separately, then my will is that, besides paying

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my wife the above annuity of ten pounds, the said *Forster Charter* shall allow my said wife, rent free, the use of the cottage at *Woodburn Hill* now occupied by *Daniel Wood*, and shall also supply her, gratis, with a reasonable quantity of bread, corn, potatoes, coals, butter, cheese, and garden produce. Should any difference of opinion arise between my said executor and my said wife," with regard to the quantity or quality of this allowance, the matter was to "be laid before *Walter Davison*, shoemaker, and his decision shall be final. Moreover, my will is, that if my daughter, *Barbara Forster*, shall at any time be sick or in want, my said executor shall afford her such pecuniary and other aid as she may require and his own circumstances may permit," which was also to be subject to the judgment of *William Davison*.

The testator had had a son named "*Forster Charter*," but he had died some years before the date of the will, and a year or so before attaining twenty-one. The testator had, at the time of executing the will, two sons; the elder, whose full name was *William Forster Charter*, and the younger, whose name was *Charles Charter*. He had also three daughters; one named *Barbara* (not, as described in the will, *Barbara Forster*), another *Margaret*, and another *Ursula*. The latter two were married, and resided at a distance from the testator. *Barbara* lived in his house and was known by that name alone. The testator died in August, 1869.

The Appellant, *William Forster Charter*, while yet a young man, left his father's house, where, it was said, disputes frequently occurred between them, and in 1850 set up business for himself as a butcher at *Cleator Moor*, in *Cumberland*, about 100 miles distant from *Woodburn Hill*. In 1853 he went to *Australia*, but returned in 1856, and resumed his business at *Cleator Moor*, only paying an occasional visit to his father. He was never called "*Forster*," but always "*William*" or "*Willie*."

Probate had been granted, by the district registrar of *Newcastle*, in the common form, on the 16th of September, 1869, to "*William Forster Charter*," as executor named in the will. In August, 1870, *Charles Charter* cited *William Forster Charter* before the Court of Probate, to shew cause why this grant of probate should not be recalled, on the ground that "*Charles Charter* is the person ap-

pointed or intended by the testator to be appointed, sole executor thereof." The Appellant put in an answer to the citation, setting forth various matters to shew the probability that the testator did intend to make *William Forster Charter*, and not *Charles Charter*, his devisee and executor. Affidavits were filed on both sides (1), some of which related to expressions and declarations made by the testator as to his intentions, others related to the state and circumstances of the members of the family, their habits, and conduct. When the case came on for hearing, the Defendant's solicitors, pursuant to notice to that effect, took the objection that the Court could not look at the affidavits for the purpose of altering the will; and Lord *Penzance*, having taken time to consider the arguments, decided, on the 13th of May, 1871, that the probate should be revoked. It was afterwards brought to his Lordship's attention that the arguments had been confined, by arrangement between the parties, to the admissibility of the affidavits, and he accordingly allowed a rehearing, a cross-examination of the deponents, and an argument on the effect of the evidence; and, on the 21st of November, 1871, he pronounced a final decree recalling the probate (2). The present appeal was then brought.

Mr. *Manisty*, Q.C., and Mr. *Bayford*, for the Appellant:—

The first question here is whether evidence was admissible to affect the meaning of the words used in the will itself; and the next, whether the Court below had put the right interpretation on the will.

A Court has no right to assume anything as to a will, nor to judge as to its meaning from any considerations of probability. It is bound to seek for the real meaning of the testator in the very words he has used. That rule has been violated in this case. The Court assumed that the person who drew the will was ignorant of the names of the testator's children, and so misdescribed them. But that supposition defeats itself, for if he was ignorant of them, the greater was the probability that he must have taken them direct from the testator himself; and if so, then it was probable that the testator had described his elder son as "*Forster*

(1) The statements in the affidavits are sufficiently referred to in the judgments.
(2) Law Rep. 2 P. & M. 315, 322.

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Charter," for that son's name was "*William Forster Charter*," but it was quite improbable that he should so describe his younger son, for that son was simply named "*Charles*," and not "*Charles Forster*," and he had never had the name of *Forster* attributed to him at all. There was no ground in this case for presuming a mistake to have been made, and for admitting any extrinsic evidence in order to correct it: *Bernasconi* v. *Atkinson* (1); for there was nothing here which called for elucidation. In construing a will a Court may explain words of doubtful meaning, but cannot strike clear words out of the will. Here "*Forster*" was struck out; and not only was it struck out, but another fault was committed, for "*Charles*" was introduced; and those things were done upon presumptions as to the intention of the testator, which presumptions were raised on inadmissible evidence, and were in absolute contradiction to the written words of the will. The authorities are adverse to what has been done here. In *Miller* v. *Travers* (2) there was a devise of all the testator's real and freehold estates in the county of *Limerick* and the city of *Limerick;* he had a small estate in the city but none in the county of *Limerick;* he had estates in the county of *Clare*, but the devisee was not allowed to shew that there was an error, and to explain the cause of the alleged error, the Court holding itself bound by the words to be found in the will (3). That case was expressly followed in *Doe* d. *Hiscocks* v. *Hiscocks* (4). The words of the will must be such as to render it matter of necessity to have recourse to extrinsic evidence to explain them; if no such necessity exists, the evidence is not admissible. In *Doe* d. *Hiscocks* v. *Hiscocks* (4) the testator had rightly described his own son *John H.*, to whom he gave an estate for life, but he then went on to give an estate tail to his "grandson *John H.*, the eldest son of his son *John H.*" The son had been twice married, and by his first wife had one son *Simon H.*, and by his second wife a son named *John H.*, who was not therefore his *eldest* son, but was his eldest son of the second family, of which there were several other children. There evidence of the testator's expressions of intention, and also of instructions for

(1) 10 Hare, 345. 17 Jur. 128
(2) 8 Bing. 244.
(3) See, however, *Langston* v. *Langston*, 2 Cl. & F. 194.
(4) 5 M. & W. 363.

the will had been admitted at the trial, but on that very ground, such evidence being held not to be admissible, a rule for a new trial was afterwards obtained and made absolute.

But assuming, for the sake of argument, evidence to be admissible, the conclusion drawn from it in this case was incorrect. The person seeking to recall the probate had upon him the burden of proof, and he has not sustained it; he did not shew that the man whose name was in the will was not the person, or that the man whose name was not in the will was the person intended; he left both matters in doubt, he could do no more than leave them in doubt, and only sought to sustain his claim by suppositions and inferences. In both respects, therefore, the decision was erroneous.

Dr. *Tristram*, Q.C., and Mr. *Pritchard*, for the Respondent:—

The argument on the other side shews that there was a latent ambiguity in the will. If so, extrinsic evidence was admissible to explain it. The person seeking to recall the probate has sustained the burden of proving who was the person really intended; he has shewn circumstances which can leave no doubt upon that point. But, besides that, the expressions in the will distinctly point to a person who is not the Appellant, and shew that the name is merely a name introduced by mistake. In *Grant* v. *Grant* (1), where the testator had described as his devisee "my nephew *Joseph Grant*," and the testator's own brother and the testator's wife's brother had each a son of that name, extrinsic evidence as to the testator's conduct and circumstances was received, and the Court acted on it.

In *Lord Camoys* v. *Blundell* (2), the whole context of the will was considered, and a mistake in a name was thereby corrected; and *Douglas* v. *Fellows* (3), *Wigram* on Extrinsic Evidence (4), *Jarman* on Wills (5), *Door* v. *Geary* (6), *Doe* v. *Huthwaite* (7), *Bernasconi* v. *Atkinson* (8), and *Drake* v. *Drake* (9) are authorities to shew that such corrections may be made.

(1) Law Rep. 5 C. P. 380.
(2) 1 H. L. C. 778.
(3) Kay, 114; 23 L. J. (Ch.) 167.
(4) 4th Ed. prop. v.
(5) 3rd ed. p. 401.
(6) 1 Ves. 255.
(7) 3 B. & Ald. 632.
(8) 10 Hare, 345; 23 L. J. (Ch.) 184.
(9) 8 H. L. C. 172.

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Even on the face of the will itself the Appellant is shewn not to have been intended, for he not only did not reside in the same house with his mother, which the Respondent always had done, but he resided, and had resided for years, and did so till the last, at a great distance from it. The descriptions in the will as to places and persons, as to acts to be done, and as to possible differences should the executor and the wife think fit not to live in the same house, but to live separately, are all applicable to the Respondent, and must be applied to correct the mere mistake of his name. Everything indicated that the testator looked to those on the spot, and to them alone, as the persons who were to carry his intentions into effect.

Mr. *Manisty*, in reply, denied that there was any ambiguity in this will. The name of the legatee and executor was clearly given, and there was a person who exactly answered it. That person was the Appellant; and the evidence which had been received, and on which his name had been removed from the will and another substituted for it, was not in itself admissible, and even when admitted had received an effect to which it was not entitled.

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LORD CHELMSFORD:—

My Lords, there are two questions in this case. First, whether the state and circumstances of the testator's family at the time when the will was made shew that there is a latent ambiguity in the will? Second, whether, reading the will by the light of the surrounding circumstances, the intention of the testator can be clearly ascertained from the language of the will, as explained by the extrinsic evidence?

The learned Judge of the Probate Court admitted parol evidence of the declarations of the intention of the testator before the making of his will with respect to the disposition of his property, and also after the will was made as to the person in whose favour he had made it. But this case does not present the sort of ambiguity in which such evidence is admissible. It is only where in a written instrument the description of the person or thing intended is applicable, with legal certainty, to each of several subjects that

extrinsic evidence, including proof of declarations of intention, is admissible to establish which of such subjects was intended by the testator: *Wigram* on Extrinsic Evidence (1).

After hearing this evidence it is difficult to resist the impression which it produces on the mind, so as to allow of an unbiassed answer being given to the question whether, to use the words of Lord *Penzance*, "there is sufficient to guide the Court to the conclusion that the name of *Forster Charter* was a mistake, and that the youngest son was intended."

The testator's family, at the time the will was made, consisted of two sons, *William Forster*, the elder, and *Charles*, the younger, and three daughters, two married to husbands named *Collinson* and *Rountree*, and an unmarried daughter, *Barbara*, who was living with the testator. *William Forster* lived with his father till 1850, when he set up as a butcher at *Cleator Moor*, in *Cumberland*. He afterwards went to *Australia* in 1853, and returned in 1856, and resumed his trade of a butcher at *Cleator Moor*. Occasionally, at distant intervals, he visited his father, who died in August, 1869. *Charles* always lived with his father, and assisted him in his farming business without receiving wages. He left home about the time when the will was made, which was on the 23rd of June, 1859, in consequence of an unpleasant occurrence in connection with a servant-girl in the family, with which it was alleged his father was much annoyed; but this is denied by the Respondent, who states that he left home on account of a disagreement with his mother. The cause of his leaving home is not so important as the time when it took place, which cannot be clearly determined. The Appellant says it was before the date of the will. The Respondent, without naming the month, says he left for a short period in 1859 or 1860. It appears to me that the time may be ascertained with some approach to accuracy by following *Charles* after he left his father's house, and looking to the evidence of those to whom he went. The Appellant says that *Charles* went first to his sister, Mrs. *Collinson*, and afterwards came to him at *Cleator Moor*. Mrs. *Collinson* says he came to her in July, 1860, that he stayed with her three weeks, that he went from her to another married sister, and finally to *Cleator Moor*. Mrs. *Collinson* may possibly be mistaken as to

(1) Prop. vii. s. 184, p. 160.

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the year, but she speaks positively as to its being the month of July when *Charles* visited her, and, therefore, whether the year was 1859 or 1860, it must have been after the will, which was made in the month of June, 1859.

The probable state of feeling of the testator towards the Appellant at the time the will was made can only be conjectured from the account given of his conduct by members of the family. Mrs. *Charter*, the mother, gives a melancholy description of the quarrels between the father and son, which, however, she qualifies considerably in her cross-examination, saying, "Sometimes quarrels took place between my son and husband whilst my husband was under drink, and sometimes they did not take place." The sisters, Mrs. *Collinson* and *Barbara*, evidently take different sides in the contest between the brothers. Mrs. *Collinson* says she never recollects any serious quarrel between her father and her brother, but that they were always on good terms; but *Barbara* says that when her brother was at home they were always quarrelling. Mrs. *Collinson*, however, left home on her marriage in 1849, ten years before the will, and the Appellant left his father's house in 1850, nine years before the will was made; still there is no evidence that the testator had any unkind feeling towards him after that period.

With respect to *Charles*, there is no evidence to shew that he did not always live on affectionate terms with his father.

In these circumstances of the family the will was made by the vicar of the parish, who, it was said, was not acquainted with the names of the testator's children. I consider this wholly immaterial, even if it could be proved, as the will must be taken to have been written under the dictation of the testator. That the writer may have occasionally mistaken the testator is probable from the daughter *Barbara* being called in the will *Barbara Forster*, the latter name not being hers, nor was she ever called or known by it.

Now it is said that, examining the will by the light of the circumstances of the family, a latent ambiguity is discovered,—that the testator devises all his estates to his son *Forster Charter*, and appoints him the executor of his will, and directs his executor, *Forster Charter*, to pay to his widow £10, and "and at the same" (the word "time" being omitted) "allow her her ordinary main-

tenance so long as they reside together in the same house." The ambiguity arises, as it is alleged, from there being no such person as *Forster Charter*, the Appellant's name being *William Forster*, and the evidence proving that he was always called by his father *William* or *Willie*, and never *Forster*. It is farther said that the ambiguity appears from the will pointing to and describing a son who was living in the house with his mother, which *Charles* always had been, and the Appellant never, since the year 1850.

Now the question is whether, from the language of the will, interpreted and explained by the extrinsic evidence, it clearly appears that the testator meant to devise his estates to *Charles*, and to make him his executor.

We are not permitted to conjecture that the name *Forster Charter* was written by the mistake of the writer, but are bound to regard it as having been dictated by the testator; and it does seem extraordinary that he should have directed this name to be inserted three times in the will, meaning it (as the Respondent contends) for his son *Charles;* and much more so, that, intending *Charles* to be the object of his bounty, and *Charles* being at that time under his roof, and, one would have supposed, if that had been the intention immediately in his mind, he should not have recollected his proper name, but should have applied to him one which at least was nearer that of his brother than of his own. *Forster* was the christian name of the testator, and he seems to have been partial to the name, for he gave it first to a son who died, and repeated it at the baptism of the Appellant.

Looking to the will, and construing its language without thinking of the rejected evidence, which we are bound to disregard, one might infer that when the testator was thinking of a successor to *Woodburn Hill*, he might have desired to perpetuate the name of *Forster* in connection with the property. With respect to the expression of the testator's will, that his executor, *Forster Charter*, should allow maintenance to the wife so long as they resided together in the same house, I am not as much impressed with it as a demonstration that the son *Charles* was intended, as I was in the course of the argument. If the words had been, so long as they *continue* to live together, they would have pointed more directly to *Charles*, but even then I should have doubted whether they

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referred to him with sufficient certainty. The will is most inartificially drawn, and the testator may have expected that having left *Woodburn Farm* to his eldest son, he would come to reside there, and then, being desirous that his wife should have a home, he expressed his will that his executor should allow her maintenance so long as they resided together, but if they chose to live separately, that he should allow her, rent-free, the use of the cottage at *Woodburn Hill*. It is a fact not to be overlooked that the will was in the possession of the testator for more than ten years, and it can hardly be believed that he did not look at it during that period, and yet it was left at his death without any alteration.

I see nothing in the extrinsic circumstances of the case which so certainly points to the Respondent as to compel us to explain the discovered ambiguity in his favour. Indeed, I doubt whether, without the evidence which ought not to have been admitted, there is any ground for alleging that there is any latent ambiguity in the will. However this may be, and assuming such ambiguity to exist, it appears to me that it is not removed by the only extrinsic evidence that was admissible; and I, therefore, move that the decree appealed from be reversed.

LORD HATHERLEY:—

My Lords, the testator in this case appoints his son, *Forster Charter*, his executor, and devises and bequeaths to him all his real and personal estate, "for his own use and benefit, and for the use and benefit of the persons thereinafter to be named." He directs his son to pay £10 a year to his wife, and at the same time to allow her her ordinary maintenance so long as they reside together in the same house, but should they think proper to live separately, then besides paying the £10 a year, the son is to allow his mother the use of a cottage and certain supplies, to be determined by a person named in the will in case of difference. The son is also to make certain allowances to the testator's daughter, *Barbara Forster Charter*.

It is in evidence that the testator had, at the date of his will, two sons, the one, his eldest son and heir-at-law, named *William Forster Charter*, the other named *Charles Charter*, and a daughter

named *Barbara Charter*, not *Barbara Forster Charter*. He resided on his own freehold farm, and held besides the cottage referred to in his will. His wife and his son *Charles* had resided with him for some years, and were residing with him (as I think on the evidence) at the date of his will. His eldest son had at one time quarrelled with his father, and had gone to *Australia*, but had returned some years before the date of the will, and had again taken up his residence 100 miles distant from the testator. The testator had once had a son named *Forster Charter*, who had died when about nineteen years old, some years before the date of the will.

Now, the facts being those that I have stated, I cannot see that any doubt or ambiguity exists in applying the words of the will, so as to authorize the introduction of parol evidence to solve that doubt. He names his "son *Forster Charter*" his executor, and devises his property to him. He had at the date of his will but two sons; one of them did not bear the name of *Forster*, the other did, though with the other name of *William*. I cannot think that a partial designation of the christian name can be said to occasion any doubt as between that son and one who does not bear the name of *Forster* at all. Had it been a devise to *W. F. Charter*, in which the initials only of the christian name were given, could there be any question raised as between him and *Charles*? I think not. Had the devisee been described as *Charles Forster* the case would have been very different. In argument, and in the decision of the learned Judge in the Court below, it has been observed that the testator calls his daughter *Barbara Forster*, whereas her name is only *Barbara*. I think this would not justify us in seeking by parol evidence to ascertain as between *William Forster* and *Charles* which of the two was meant by the description of "*Forster Charter*."

Will any other expression on the face of the will so justify us? I think not. Had the testator spoken of the devisee "continuing" to live with his mother at the farm, the case might have been different, but the language actually used is just as appropriate to the elder son as to the younger. Nothing could be more natural than for the testator to suppose that the devisee, whichever son took, would live on the property devised, and carry on the farm as

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the testator himself had done; and then the testator provides in that case for the wife and daughter. It is true he does not provide for *Charles*, but on the other supposition he does not give anything to his eldest son and heir.

I confess I know of no authority which, where a will is plain and sensible on the literal construction of it, would authorize the Court to transfer the property from a person named by a christian and surname which he bears, to another not bearing the christian name, merely because the full christian name of the devisee is not given. If the son called *Forster* only had not died long before, he would of course have had the better title, as fully and completely answering the designation; but I can see no ground for the transfer to *Charles*.

I think the learned Judge miscarried in admitting evidence of declarations of intention by the testator. Such evidence can only be given to distinguish between two subjects or objects of a gift bearing the same description, the will being in itself clear, but the latent ambiguity being disclosed by evidence *dehors* the instrument. This evidence, if admitted, would not fail to influence the mind of the learned Judge in his decision. Had it been right to analyse its effect, it would appear that none of the family doubted that the will, in words, designated the elder son, but they were surprised at the devise being inconsistent with parol declarations of the testator. It was upon that ground, as it seems to me, that the second son, *Charles*, was led to institute this suit.

Therefore, my Lords, I am of the same opinion as my noble and learned friend who has preceded me.

THE LORD CHANCELLOR (Lord *Cairns*):—

My Lords, the consideration of this case has been attended, to me, with much anxiety, and that anxiety has not been diminished when I find that I have come to a conclusion upon it different from that at which some of your Lordships have arrived.

My Lords, upon one part of the case I have never entertained any doubt. I hold it to be clear, as I think all your Lordships do, that this is not a case in which any parol evidence of statements of the testator, as to whom he intended to benefit, or supposed he had benefited, by his will, can be received. The

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learned Judge of the Probate Court, Lord *Penzance*, appears to have admitted evidence of this description, although he states that his judgment would have been the same if the evidence had been excluded. I am of opinion that it ought to have been excluded. The only case in which evidence of this kind can be received is where the description of the legatee, or of the thing bequeathed, is equally applicable in all its parts to two persons, or to two things. That clearly cannot be said of the present case.

But, my Lords, there is a class of evidence which in this case, as in all cases of testamentary dispositions, is clearly receivable. The Court has a right to ascertain all the facts which were known to the testator at the time he made his will, and thus to place itself in the testator's position, in order to ascertain the bearing and application of the language which he uses, and in order to ascertain whether there exists any person or thing to which the whole description given in the will can be, reasonably and with sufficient certainty, applied.

I may refer, as well-known authorities for these propositions, to the cases of *Doe* v. *Hiscocks* (1), *Bernasconi* v. *Atkinson* (2), and *Drake* v. *Drake*, in this House (3).

Applying, then, this principle, what are the facts legitimately in evidence in this case? The testator, *Forster Charter*, was a Northumbrian yeoman, living, at the time he made his will, on his own freehold farm, with his wife and with a son, the Respondent *Charles Charter*. The testator, besides his son *Charles*, had had two other sons, one, the elder, named *William Forster*, and another named only *Forster*, who had died when about nineteen years old, some years before the will was made. He had three daughters, two of them married—Mrs. *Collinson* and Mrs. *Rountree*—and an unmarried daughter, living with him, named *Barbara*.

The will of the testator is dated the 23rd of June, 1859, and he died on the 8th of August, 1869.

With regard to the son *William Forster*, he lived with his father and mother till 1850, when he set up as a butcher at *Cleator Moor*,

(1) 5 M. & W. 363. (2) 10 Hare, 345.
(3) 8 H. L. C. 172.

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in *Cumberland*, more than 100 miles from the testator's house. He went to *Australia* in 1853, and in 1856 returned and resumed his trade of butcher at *Cleator*. From this time his visits to his father, if there were more than one, were at distant intervals. Prior to 1850 when he lived with his father, there appears to have been a certain amount of quarrelling between them, but there is no evidence that after 1850 any ill feeling continued to exist. It is in evidence, and not seriously contradicted, that the testator was in the habit of calling this son "*William*," or "*Willie*," and not "*Forster*."

As to the son *Charles*, he lived, as I have already said, with his father and mother, working with his father on the farm, and receiving no wages. My conclusion from the evidence is that he was living with his father and mother at the time that the will was made, for it appears to me that the statements of Mrs. *Collinson*, a witness for the Appellant, and the cross-examination of the widow, fixing the day of the birth and age of an illegitimate child, born "shortly after *Charles* left home," make it clear that he did not leave home till after the will was made. His absence from home at that time was temporary, and owing, apparently, to circumstances connected with the illegitimate child to which I have referred; and after this absence he returned, and was living with the testator up to and at the time of his death.

I now turn to the will of the testator. It commences: "The last will and testament of *Forster Charter* . . . I nominate and appoint my son *Forster Charter* as the executor of this my will, and to him I give, devise, and bequeath all my messuages, &c., for his use and benefit, and for the use and benefit of the persons hereinafter to be named." The name here given to the person whom he describes as his son is clearly inaccurate. His son *Forster Charter* was dead. The younger of his two surviving sons was *Charles;* the elder was *William Forster;* but *Forster* was not his first or leading name, nor was it the name by which he was generally or ever called or spoken of by the testator. There is, therefore, here clearly a mistake. It is possible that if nothing else was found in the will, yet, inasmuch as *Forster* formed a part of the name of the elder son, and no part of the name of the

younger son, the elder son must have taken, there being no description nor demonstration to rectify or explain the mistake in the name.

But the testator continues: "My will is that my executor, *Forster Charter*, shall annually pay to *Elizabeth Charter*, my wife, the sum of ten pounds sterling, and at the same [time] allow my said wife her *ordinary* maintenance *so long as they reside together in the same house, but should they think proper to live separately*, then my will is that besides paying my wife the above-named annuity of ten pounds, the said *Forster Charter* shall allow my said wife, rent free, the use of the cottage at *Woodburn Hill* now occupied by *Daniel Wood*, and shall also supply her gratis with a reasonable quantity of bread, corn, potatoes, coals, butter, cheese, and garden produce. Also my will is that should any difference of opinion arise between my said executor and my said wife with regard to the quantity or quality of the above-named bread, corn, potatoes, &c., the matter shall be laid before *Walter Davison*, shoemaker, and his decision shall be final." These words appear to me to be very important. They do not give to the widow an annuity and maintenance "*if*" she and the son should reside together, or "provided" the son should live with his mother, or the mother with the son; but it is a direction to the executor to pay an annuity and allow maintenance "so long as they reside together in the same house," with farther directions should they "think proper to live separately." It appears to me that these words are intelligible and appropriate when applied to persons who were living together at the time, but that they are entirely inappropriate if applied to persons not so living together, and if intended to indicate a joint residence to commence for the first time at a future period.

Moreover, it was in the highest degree natural for the testator to contemplate the continuance of a conjoint residence which then existed, and had existed so long; but it was in a high degree improbable that he should assume that his eldest son would not merely leave the place where he was settled in life, but also take his mother to live with him. The words, "so long as they reside together," appear to me to be equivalent to the words "so long

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as they continue to reside together," and have, in this sense, involved in them the statement that the persons spoken of did reside together at the time. Farther than this, the maintenance to be allowed the widow is termed "ordinary maintenance," which is put in marked contradistinction to the "reasonable quantity of bread, corn, potatoes, coals, butter, cheese, and garden produce," which, if she were to live separately, and occupy the cottage, she was to receive, and any difference as to the amount of which was to be referred to the arbitration of *Davison*. I understand the terms "ordinary maintenance" to mean the usual or accustomed maintenance which she had hitherto had in the testator's house, which was to be judged of, not by the decision of *Davison*, but by the standard of what had been customary during the joint residence of the father and mother and the son *Charles*.

The result, therefore, is, that I find the testator speaking of a "son" as the object of his bounty. He has but two sons, and the name he gives is not the name of either. It is part of the name of one, but not his first name, or the name by which he is known and called. The testator is not accurate in the names of his children, for he calls his daughter, whose name was *Barbara* only, "*Barbara Forster*." To the inaccurate name of his son I find him adding a provision, which, although in terms a gift of an annuity and maintenance to his wife, is, in substance, a description or demonstration, as I read it, of the son who was to be executor and devisee.

The case, therefore, appears to me to become one of those in which there is an erroneous or inaccurate name, and a description or demonstration sufficiently clear to correct the error or inaccuracy. The name and the description cannot, as it appears to me, stand together. In *Drake* v. *Drake* (1), where there was an accurate name, "*Mary Frances Tyrwhitt Drake*," but an inaccurate description, "niece," and which, therefore, was a much stronger case than the present, for there the name was wholly accurate, the Lord Chancellor, in moving the judgment of this House, expressed himself thus: "I see nothing that can warrant us in saying that the testator intended that his sister, *Mary Frances Tyrwhitt Drake*,

(1) 8 H. L. C. 172.

should take the residuary estate under his will, unless the maxim which is contended for by the Appellant should govern the case, that without any evidence whatever to prove error of demonstration, there is a rigid rule that the name should prevail. But, my Lords, I deny that there is any such rule. There is a maxim that the name shall prevail against an error of demonstration; but then you must first shew that there is an error of demonstration, and until you have shewn that, the rule *veritas nominis tollit errorem demonstrationis* does not apply. I think that there is no presumption in favour of the name more than of the demonstration. Upon referring to the numerous cases that have been cited at the Bar, it will be found that there are more instances in which the demonstration prevailed than in which the name prevailed."

And there are some observations upon the same subject by the Vice-Chancellor, my noble and learned friend here present (Lord *Hatherley*), in *Bernasconi* v. *Atkinson* (1), which, I think, are worthy of your Lordships' attention. The Vice-Chancellor says: "It certainly does appear, singularly enough, that the description of the legatee has, in most of the cases referred to, prevailed over the name. Thus, in *Adams* v. *Jones* (2), the description of 'wife,' and in *Bradshaw* v. *Bradshaw* (3) the description of 'second son,' were held to designate the respective legatees. In *Doe* v. *Huthwaite* (4), also, the name of the legatee was wrongly expressed, and the description of second son determined the title to the legacy. The selection of the second son shewed that the attention of the testator was directed to that description of the object of his bounty, although the name was misplaced, the name of the third son being mentioned in priority to that of the second. So, again, in *Lord Camoys* v. *Blundell* (5), the gift was to a person not named, but described as the second son of *Edward Weld* of *Lulworth*, although there was no such person as *Edward Weld*, the possessor of *Lulworth* being *Joseph Weld*. There, the description of 'second son' prevailed, and was held to designate clearly the second son of

(1) 10 Hare, 345. 17 Jur. 128
(2) 9 Hare, 685; 21 L. J. (Ch.) 352.
(3) 2 Y. & C. 72.
(4) 3 B. & Ald. 632.
(5) 1 H. L. C. 778.

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Joseph. Lady *Stourton* was mentioned as one of the sisters of *Edward Weld.* She was a sister of *Joseph,* and the only person answering the description was the second son of *Joseph.* But, although this had happened in those cases, they do not say 'take the description in preference to the name.' Far from it; the principle of the cases is, that where there are two descriptions, where the testator specifies in two different ways the object of his bounty, the Court adopts that which, in each instance, appears to be the least open to error."

Applying the principle of these authorities, it appears to me that we have here a name in which there is obviously an error, and a description or demonstration which, as I read it, is clear and intelligible, and applies satisfactorily to the younger son, and does not apply to the elder, and therefore corrects the error of the name. My Lords, my noble and learned friend who addressed your Lordships last has said he knows of no authority which would authorize the Court to transfer the property from a person named by a christian and surname which he bears, to another not bearing the christian name, merely because the full christian name of the devisee is not given. My Lords, I must submit to my noble and learned friend that this is the assumption of the whole question. The question is not one of transferring property from a devisee. The question is, who is the devisee? and that question must be answered by an examination of the whole will, and of all the circumstances of the case legitimately in evidence, an examination which becomes proper and even necessary as soon as it is found that the name inserted in the will is not the correct name of any person in existence.

My Lords, I think that the judgment of the Court below ought to be affirmed. But I farther think that, as the case is one of great difficulty, and difficulty caused by the testator himself, your Lordships would do well to follow, with regard to the appeal, the course taken by the Court below, and order the costs of both parties to be paid out of the estate.

LORD SELBORNE:—

My Lords, I have found great difficulty in satisfying my mind

on this case, especially after I became aware of the view of it taken by my noble and learned friends who are for reversal, and I am not ashamed to own that my opinion upon it has fluctuated.

If the direct evidence of intention, which has been offered by the Respondent independently of the light thrown by extrinsic facts upon the words of the will, could properly be regarded, there would be no difficulty; but I think we are compelled to hold, after *Doe* v. *Hiscocks* (1), *Bernasconi* v. *Atkinson* (2), and *Drake* v. *Drake* (3), that the Court below was wrong in receiving that evidence. Why the law should be so, in cases where some error of description, involving a latent ambiguity, has to be corrected, when evidence of the same kind is admitted in what Lord *Bacon* describes as cases of "equivocation" (4), I am not sure that I clearly understand; but it has been conclusively so settled by a series of authorities to which we are bound to adhere.

My noble and learned friends opposite think that in this case the whole description of the devisee is contained in the words "my son *Forster Charter*;" and that there is nothing in the rest of the will which is not applicable to the Appellant as properly as to the Respondent. If they are right in this, I am not disposed to dispute the correctness of their conclusion that the description, as a whole, would be more properly applicable to the elder son, whose baptismal name is *William Forster*, than to the younger son, whose baptismal name is *Charles*.

In order to see whether this view is right, it has seemed to me, after much consideration, that no better test can be suggested than one which was put by my noble and learned friend on the woolsack during the course of the argument. If the name, "*Forster*," had not occurred at all in the will, but if a blank had been left for the christian name of the legatee, wherever it occurs (the rest of the will being the same as it is now), would, or would not, the whole devise have been void for uncertainty? If it would, then the view, that there is nothing in the will except the name "*Forster*" more applicable to the one son than to the other, is

(1) 5 M. & W. 363.
(2) 10 Hare, 345. 17 Jur. 128
(3) 8 H. L. C. 172.
(4) Maxims of the Law, Rule XXIII.

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correct. But it is otherwise, if (in the absence of any christian name) there would be enough in the will to shew that the younger son was meant, and to prevent the devise from being void for uncertainty. It would clearly not be necessary, in that case, that a demonstration, sufficient to shew which son was meant, should be in the *form* of a *descriptio personæ;* any words, in any part of the will, which might enable the Court to see with sufficient clearness that the testator meant one son, and not the other, must be enough for that purpose.

Applying this text, with the knowledge that the younger son, an unmarried man, had always down to the date of the will resided and been domesticated in the same house with the testator, and with his mother, the testator's wife (for such I consider to be the true result of the evidence), and that the elder son, a married man with issue then living, had not resided in the testator's house for nine years before the will was made, and then lived one hundred miles off; with the knowledge, also (which in *Bernasconi* v. *Atkinson* (1), and other cases, was thought not immaterial), that the younger son was in constant communication with the testator, who was much attached to him, while his communications with the elder son were unfrequent, I should not have hesitated to say that the words, "so long as they reside together in the same house" (with the rest of the context in which those words are found), would have been enough to indicate the younger son, who resided in the same house with the testator and his wife at the date of the will, as the person intended, and to save the devise from being void for uncertainty. If such would have been the effect of these words, in the case supposed, then I cannot think that the view which regards them as equally and indifferently applicable to the elder and to the younger son, in the will as it stands, can be correct.

Still it does not follow that the scale may not be turned in favour of the Appellant by the name "*Forster*"—and it is on that point that I have felt most hesitation. When a Court has to choose between the name, which is only one part of an entire description, and other parts of the description more applicable to a person who

(1) 10 Hare, 345. 17 Jur 128

does not bear the name, there is certainly no general rule that the name should have a preponderating weight; nor even that, *in re dubiâ*, it should always turn the scale, so as to save the devise from being void for uncertainty. Not to mention *Bradshaw* v. *Bradshaw* (1), where evidence not properly admissible was received, in *Doe* v. *Hiscocks* (2) the gift was to the testator's "grandson, *John Hiscocks*, eldest son of his son, *John Hiscocks*." There was a grandson named *John Hiscocks*, who exactly fulfilled all parts of the description, except that he was not the *eldest* son of his father, although he was the eldest son of his father's second marriage. The eldest son (the lessor of the Plaintiff in the case), was named *Simon;* and the Court of Exchequer, when directing a new trial on account of the improper reception of evidence, said that unless evidence of surrounding facts could be given, which would warrant a Judge in directing a jury that the testator meant either the lessor of the Plaintiff or the Defendant, "the Defendant will, indeed, for the present succeed; but the claim of the heir-at-law will probably prevail ultimately, on the ground that the devise is void for uncertainty." And this House, in *Drake* v. *Drake* (3), held the gift of a share of the testator's residuary estate to his "niece, *Mary Frances Tyrwhitt Drake*," to be void for uncertainty; there being no *niece* who had the composite name *Mary Frances Tyrrwhitt;*" (there were four nieces named "*Mary Caroline Tyrrwhitt*," "*Mary Elizabeth Tyrrwhitt*," "*Frances Isabella Tyrrwhitt*," and "*Frances Charlotte Tyrrwhitt*"), though the Appellant, the testator's sister-in-law, to whom (under the description of "my sister, *Mary Frances Tyrwhitt Drake*"), another gift was made by the will, bore that exact name.

Admitting that in the present case the context, which I consider to point (*primâ facie*, at all events) to the younger son, then domesticated with his parents, might not be strong enough to exclude the elder son if he had been baptised "*Forster*," or had usually been so called by his parents, it appears to me that we have not really here "*veritatem nominis.*" The true baptismal name of the elder son was not "*Forster*," but "*William Forster*,"

(1) 2 Y. & C. 72. (2) 5 M. & W. 363.
(3) 8 H. L. C. 172.

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which, if he had usually been called *Forster*, would of course, have been immaterial. But he was, in fact, never called "*Forster*," (not even "*William Forster*"), but always "*Willie*;" and there had been another son baptised and called by the name of "*Forster*" only, who had died sixteen years before, after attaining sufficient age to take an active part in the management of the testator's farm.

The conclusion which I draw judicially from these facts, is, that the testator would not, except through some clerical error, have used the words "my son *Forster Charter*," to describe either of the sons living at the date of the will; that these words strictly and properly describe the deceased son only, and (but for some error), would have been used in that sense only by the testator; and that if the testator had meant to describe his eldest son, he would (but for some error), have done so either under the name "*William*," by which alone that son was habitually called and known in the family, or under his full and proper baptismal name "*William Forster*;" just as, if he meant to describe the Respondent, he would (but for some error), have called him "*Charles*."

The moment we find sufficient reason to conclude that there is really error in the name, the observation made in *Bernasconi* v. *Atkinson* (1), that "we are always bound to assume that the language of the will is the language of the testator," ceases to be material. It is, then (as was observed in the same judgment (2)), "part of the case, that a mistake has been made;" and it can make no difference whether the slip was the testator's own, or that of some one else whom he employed to draw up the will, and whose words he adopted.

This being my view, it follows that the use of an inaccurate name, which agrees only partially with the baptismal, and not at all with the familiar name of the elder son, ought not to prevent the younger son from taking, when he, according to what I think sufficient and more trustworthy indications of intention discoverable in the rest of the will, would have taken, if no christian name at all had been mentioned.

I felt at one time a very strong inclination to yield to the autho-

(1) 10 Hare, 348. 17 Jur 128 (2) Page 353.

rity of my two noble and learned friends, who think otherwise; but the result is, that I find myself unable to give my voice against that of my noble and learned friend on the woolsack, and in favour of a reversal of the judgment of the Court below.

The following entry was afterwards made on the Journals: "The question was put,—whether the Orders and Decrees complained of in the said appeal be reversed? and it appearing that the votes were equal; thereupon, according to the ancient rule in the law (semper presumitur pro negante) it was determined in the negative," and the costs of both parties, as well in the Court below as in this House, were ordered to be paid out of the estate; and with these directions the cause was remitted to the Court of Probate.

Lords' Journals, 24th July, 1874.

Solicitors for the Appellant: *Helder & Roberts.*
Solicitors for the Respondent: *Flux & Leadbitter.*

1874
July 9, 10, 24.

EDWARD WILLIAM O'MAHONEY. . . . APPELLANT;

AND

ADELAIDE LOUISA BURDETT. . . . . RESPONDENT;

Will—"Die unmarried or without Children"—Executory Gift—Fourth Rule in Edwards *v.* Edwards (1) *considered, and not approved of.*

A bequest to *A.*, and if she shall die unmarried or without children, to *B.*, is an absolute gift to *A.*, defeasible by an executory gift over in the event of *A.* dying, at any time, unmarried or without children. This construction can only be affected by a context which renders a different meaning necessary. A gift to *X.* for life with remainder to *A.*, and if *A.* dies unmarried or without children to *B.*, is an executory gift over, which will defeat the absolute interest of *A.* in the event of *A.* dying, at any time, unmarried or without children.

There is no rule of construction arising from possible delay in the vesting of a gift, which controls the natural meaning of the terms of the bequest.

There is no authority that the words introducing a gift over in the case of the "death unmarried or without children" of a previous taker, do not indicate, according to their natural meaning, death unmarried or without children at any time, or that the ordinary and literal meaning of the words used is to be departed from otherwise than in consequence of a context which renders a different meaning necessary or proper.

Gift of £1000 consols to *A.* for her life, after her death to her daughter *B.*, "if *B.* should die unmarried or without children the consols I here will to revert to *C.*" The will then appointed *D.* residuary legatee. Both *A.* and *C.* died in the lifetime of the testatrix. On her death *B.* entered into possession, and married, but after some years died without ever having had a child:—

Held, that on the death of *B.* without children the gift over to the residuary legatee took effect, and that it was not affected by the death of *C.* in the lifetime of the testatrix. The gift to *C.* failed by lapse, and the residuary legatee became entitled to take all that *C.*, if living at the death of the testatrix, could have taken.

The words "I here will to revert to *C.*" indicated a benefit intended for *C.* by means of an executory limitation over, after enjoyment by a previous taker, and not an alternate gift to take effect, if at all, before the period of enjoyment had commenced.

The classification of rules set forth in *Edwards* v. *Edwards* (1) examined, and the fourth rule, as there stated, overruled.

Per Lord *Hatherley*:—The fourth rule in *Edwards* v. *Edwards* would be better stated thus:—"The period to which the executory devise will be referred will be the period of the death of the first taker, unless there are directions in the will inconsistent with that supposition."

Da Costa v. *Keir* (2), *Galland* v. *Leonard* (3), and *Home* v. *Pillans* (4), discussed and explained.

THIS was an appeal against a decision of the Lord Chancellor

(1) 15 Beav. 357; 21 L. J. (Ch.) 324.
(2) 3 Russ. 360.
(3) 1 Sw. 161.
(4) 2 My. & K. 15.

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O'MAHONEY v. BURDETT.

Brady and the Lord Justice of Appeal *Blackburn* in *Ireland*, reversing a previous decision of the Master of the Rolls there (1).

Jane Brooke, in September, 1840, made her will, which contained the following clause:—"I bequeath to my sister *Grace L'Estrange*, the widow of Colonel *L'Estrange* of *Moystown*, the sum of £1000 in the 3½ per Cent. Irish Stock, for her life, and after her death to her daughter *Grace L'Estrange*. If my said niece should die unmarried or without children, the £1000 I here will to revert to my nephew Colonel *Henry L'Estrange* of *Moystown*." The testatrix then appointed *John Burdett* her executor and residuary legatee. The present Respondent is his widow and universal legatee.

Grace L'Estrange, the sister of the testatrix, and also Colonel *Henry L'Estrange* died in the lifetime of the testatrix. The testatrix herself died on the 29th of March, 1848.

Grace L'Estrange, the niece, in 1851, married *Edward William O'Mahoney*, the Appellant, and the bequest of the £1000 was, upon occasion of her marriage, brought into settlement to her for her life, for her sole and separate use, after her decease to her husband for his life, then to the issue of the marriage, and in default of issue to the survivor, husband or wife. Mrs. *O'Mahoney* died on the 14th of December, 1871, without there having been any child of the marriage, and her husband, the Appellant, survived her.

In 1858 a cause petition was presented to the Court of Chancery in *Ireland* by Mr. *O'Mahoney* and his wife, praying, amongst other things, that their right to the said legacy should be established, and an order to that effect was afterwards made by the then Master of the Rolls. On appeal, Lord Chancellor *Brady* and Lord Justice of Appeal *Blackburn* concurred in reversing this order (1). Mr. *Burdett*, the executor and residuary legatee died in 1870, leaving the present Respondent his widow and personal representative. On the death of Mrs. *O'Mahoney*, in December, 1871, the Appellant revived the suit, by suggestion, as against Mrs. *Burdett*. The question raised was upon the construction of the above bequest; whether, in the events which had happened, the sum of £1000 had, on the death of the tenant for life, become the absolute property of *Grace O'Mahoney* and her assigns, or was affected by her own subsequent

(1) 10 Ir. Ch. Rep. (N.S.) 14.

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death without children, so as to go over by force of the ultimate gift to *Burdett* under *Jane Brooke's* will. The decision of the Court of Appeal, pronounced in 1859, was, by special order of the Court, signed and enrolled on the 4th of January, 1873, and this appeal was then brought,

Mr. Serjeant *Sherlock* (of the Irish Bar) and Mr. *F. Everitt* for the Appellant:—

This case was originally decided in the Rolls Court on the authority of the rule stated in *Edwards* v. *Edwards* (1), where all the previous authorities were most carefully considered and their results classified. In the Court of Appeal that case, and the authorities on which it was founded, were disregarded. The rule, however, is clear that where there is a gift to a tenant for life, and a subsequent taker is introduced, and his death is treated as a contingency, that death is to be considered with reference only to the death of the tenant for life, and therefore the interest of the subsequent taker becomes absolute on his surviving the tenant for life. Here the title of *Grace L'Estrange* the niece became absolute on the death of her mother, the sister of the testatrix, named in the will as tenant for life of the fund. On her own death the title to it, as to property absolutely belonging to her, vested in her husband the Appellant. Such was plainly the intention of the testatrix, and the only event on which the legacy to the niece was to be defeated was upon her dying before her mother, unmarried and without children. The testatrix never intended that after the death of the tenant for life the title to the legacy should remain in abeyance until the death of the niece, which might not happen for many years, for before then it would be impossible to say whether she might or might not have children: *Da Costa* v. *Keir* (2); *Doe* d. *Bloomfield* v. *Eyre* (3); *Sugden* on Powers (4); *Cripps* v. *Wolcott* (5); *Jackson* v. *Noble* (6); *Douglas* v. *Chalmer* (7); *Re Allen's Estate* (8); *Dean*

(1) 15 Beav. 357; 21 L. J. (Ch.) 324.
(2) 3 Russ. 360.
(3) 5 C. B. 713.
(4) C. 5, s. 1, p. 167; c. 10, s. 1, pp. 513, 514.
(5) 4 Madd. 11.
(6) 2 Keen, 590.
(7) 2 Ves. Jun. 501.
(8) 3 Drew. 380; 25 L. J. (Ch.) 286.

v. *Handley* (1); *In re Hill's Trusts* (2); *Galland* v. *Leonard* (3); *Latter* v. *Edmonds* (4); *Home* v. *Pillans* (5); *Slaney* v. *Slaney* (6). The Courts will not adopt a construction of a will which would leave a gift like this so long in abeyance.

Mr. *George May*, Q.C. (of the Irish Bar), and Mr. *Vaughan Hawkins* (Mr. *R. J. Robertson*, of the Irish Bar, was with them), for the Respondent:—

The legacy here did not become absolutely and indefeasibly vested in *Grace L'Estrange*, the niece, on the death of the tenant for life. There was still a contingency on which it might be defeated, and that was her own death at any time, unmarried or without issue. She did marry, but she died without a child. In the event of her so dying without issue, the testatrix directed that the fund should go over to Colonel *Henry L'Estrange*. If he could not take it, the fund would fall into the residue. Whenever the event happened of *Grace L'Estrange* dying without issue, whether before or after the death of her mother, the tenant for life, the gift went over. It was not necessary to impugn the decision in *Edwards* v. *Edwards* (7). Under the circumstances of that particular case it might be assumed to be correct; but, assuming it to be so, it did not govern this case. In fact all the cases of this sort depended on the particular words of each will, and could with difficulty be ranged into a class of settled rules admitting of no change in their application. Where the will was intended to provide, not only for the death of a donee, but for the death of the donee without children, the intention would be but half fulfilled if the death of the tenant for life was taken as the limit at which the donee's title was to become absolute. On the death of the donee without children at any time, before or after the death of the tenant for life, the gift would be determined, and the fund would fall into the residue if there was no intervening donee to take it. In this case, therefore, it had done so, and it was not prevented doing so by the fact that Colonel *Henry L'Estrange* had died before the testatrix; in consequence of his death it went by

(1) 2 H. & M. 635. *Wms. MS. 686* (4) 3 Madd. 270.
(2) Law Rep. 12 Eq. 302. (5) 2 My. & K. 15.
(3) 1 Sw. 161. (6) 33 Beav. 631
(7) 15 Beav. 357; 21 L. J. (Ch.) 324.

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lapse to the residuary legatee. *Wilkinson* v. *South* (1), *Smith* v. *Spencer* (2), *Bowers* v. *Bowers* (3), and *Cooper* v. *Cooper* (4), shew that the death of the tenant for life was not the period at which the title to the fund would become absolute.

Mr. Serjeant *Sherlock*, in reply.

1874
July 4.

THE LORD CHANCELLOR (Lord *Cairns*):—

My Lords, *Jane Brooke*, by her will, dated the 18th of September, 1840, made a bequest of a sum of £1000 in the following words:—"I bequeath to my sister, *Grace L'Estrange*, the widow of Colonel *L'Estrange*, of *Moystown*, the sum of £1000 in the 3½ per Cent. Irish Stock, for her life, and after her death to her daughter, *Grace L'Estrange*. If my said niece should die unmarried or without children, the £1000 I here will to revert to my nephew, Colonel *Henry L'Estrange*, of *Moystown*;" and the testatrix appointed her nephew, *John Burdett*, her residuary legatee. Colonel *Henry L'Estrange* died before the testatrix, and so did *Grace L'Estrange*, the tenant for life of the legacy. The testatrix herself died on the 29th of March, 1848. *Grace L'Estrange*, the niece of the testatrix, was married in 1851 to the Appellant *O'Mahoney*, and died in 1871, and there was no child of the marriage.

The Appellant, under these circumstances, contends that the interest of *Grace L'Estrange*, the niece, otherwise *O'Mahoney*, became, upon her surviving both her own mother and the testatrix, the tenant for life, absolute and indefeasible. He contends, in other words, that by the expression, "if my niece should die unmarried or without children," is to be understood the death of the niece unmarried or without children, not at any time whatsoever, but only during the lifetime of the tenant for life. Of this opinion was the then Master of the Rolls in *Ireland*, who made an order to that effect on the 15th of July, 1859. But this order was reversed by the Judges in the Court of Appeal in Chancery in *Ireland*, who by an order dated the 17th of November, 1859, declared that the bequest of £1000 stock to *Grace O'Mahoney* was

(1) 7 T. R. 555.
(2) 6 De G. M. & G. 631.
(3) Law Rep. 5 Ch. Ap. 244.
(4) 1 K. & J. 658.

defeasible in the event of her dying unmarried or without children, at any time. Under this order the Respondent, as the representative of the residuary legatee, now claims to be entitled to the legacy.

In the absence of any authority to the contrary, I should entertain no doubt that the decision of the Court of Appeal in Chancery in *Ireland* was in accordance with the true interpretation of the will. A bequest to *A.*, and if she shall die unmarried or without children to *B.*, is, according to the ordinary and literal meaning of the words, an absolute gift to *A.*, defeasible by an executory gift over, in the event of *A.* dying, at any time, under the circumstances indicated, namely, unmarried or without children. And in like manner a bequest to *X.* for life, with remainder to *A.*, and if *A.* die unmarried or without children to *B.*, is, according to the ordinary and literal meaning of the words, an executory gift over, defeating the absolute interest of *A.* in the event of *A.* dying, at any time, unmarried or without children.

In this particular will any light that is to be obtained from the context is not opposed to, but supports, the natural meaning of the words. The direction that if the niece should die unmarried or without children the £1000 is "to revert to my nephew Colonel *Henry L'Estrange*," appears to indicate that the legacy was to come back, or come away, from the niece after she had had the possession and enjoyment of it, rather than to imply that the only state of circumstances under which Colonel *Henry L'Estrange* could take, would be a state of circumstances under which the niece would have had no enjoyment of the legacy at all. In other words, the benefit intended for the nephew appears to me to be introduced through the medium of an executory limitation over after enjoyment by a previous taker, and not as an alternative gift to take effect, if at all, before the period of enjoyment commences.

But it is said that there is now established an absolute rule of law, or rule of construction, that where there is a gift for life, followed by a gift over of the capital, with a proviso that if the second taker shall die under age, or unmarried, or without children, there the death of the second taker, thus described, is to be taken to refer, not to death under those circumstances at any

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time, but to death under those circumstances before the tenant for life; and the case of *Edwards* v. *Edwards* (1), decided by the late Master of the Rolls, is referred to as the authority for this proposition.

It is clear that the case of *Edwards* v. *Edwards* (1), decided in the year 1852, could not establish any new rule of construction applicable to cases of this kind; and it is equally clear, looking at the report of the case, that the Master of the Rolls did not intend to establish any new rule of construction. His Honour endeavours to collect and classify the various decisions which have taken place as to construction of gifts over in the case of death, or in the case of death under particular circumstances; and the question is, whether that part of his judgment which deals with gifts, like the one before your Lordships, is a just expression of the principles to be deduced from decisions before that time.

As regards the question actually decided in the case of *Edwards* v. *Edwards* (1), with reference to the will then before the Court, there were expressions in that will which may well have warranted the conclusion at which the Court arrived. The testator devised freeholds and leaseholds to his wife for life or widowhood. Then part of the property he gave to his eldest son "for him and his heirs to possess immediately after his mother's death or marriage." He made similar devises and bequests to another son and to a daughter; and he continued: "If my wife shall remain my widow my trustees shall assign and transfer to each of my children their shares, immediately after her death, and as soon as they arrive at twenty-one years of age: . . . . Farther, if one of my children shall die leaving no children, his or her share shall be equally divided between the other two." The direction here for an assignment and transfer, coupled with immediate and absolute possession upon the death of the tenant for life, may well have justified the decision confining the contingency, of death without children, to the life of the tenant for life.

The Master of the Rolls, however, in his judgment, divides the cases on this subject into four classes. Upon the first three classes it is not necessary to do more than to point out that the conclusions drawn from them by His Honour do not appear to me in any

(1) 15 Beav. 357; 21 L. J. (Ch.) 324.

way to lead up to the rule which he deduces from the fourth class of cases which he mentions. The first class of cases is that where there is a gift to *A.*, and if he shall die to *B.* If in such a case the words are to be read literally, you have, in the first place, the absolute gift, and then a gift over in the event of death; an event not contingent but certain, and in order to avoid the repugnancy of an absolute giving and an absolute taking away, the Court is forced to read the words "in case of death" as meaning in case of death before the interest vests.

With regard to the second class of cases, namely, gifts to *A.* for life, and if he shall die without children, over, the Master of the Rolls expresses himself thus:—"In the second of the supposed cases there is a manifest distinction. There the event spoken of on which the legacy is to go over is not a certain but a contingent event. It is not in case of the death of *A.*, but in case of his death without children; and here it would be importing a meaning and adding words to the will, if it were to be construed to import as a condition which was to entitle *B.* to take, that the death of *A.* without children must happen before some particular period. In these cases, therefore, it has always been held, that if at any time, whether before or after the death of the testator, *A.* should die without leaving a child the gift over takes effect, and the legacy vests in *B.* This is established by the case of *Farthing* v. *Allen* (1), mentioned in *Maddocks*, but reported only in *Jarman* on Wills" (2). My Lords, I agree with these observations, but I must observe in passing that I am unable to understand how it is not, to use the expression of the Master of the Rolls, "importing a meaning and adding words to the will," if you construe it to imply, as a condition which is to entitle *B.* to take, that the death of *A.* without children must happen before some particular period, any more where there is not, than where there is, a previous life estate. I may pass over the third class of cases as not bearing upon the question now before your Lordships.

The fourth class of cases mentioned by the Master of the Rolls consists of those where a life estate is given, and the property is then given to *A.* with a direction that if he shall die leaving no child (or unmarried or under twenty-one), over. As to these

(1) 2 Madd. 310. (2) Vol. ii. p. 688.

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cases the Master of the Rolls observes, that the words referring to death without leaving a child, &c., may be applied to death at any time whenever it may occur; "nor," he continues, "if it were *res integra* would it be easy, in the absence of any indication of intention to be collected from the rest of the will, to determine what construction ought to prevail." The Master of the Rolls, however, proceeds to say that he considers it "settled, both by principle and authority, that, in the absence of any words indicating a contrary intention, the rule is, that the words indicating death without leaving a child," must be construed to refer to the occurring of that event before the period of distribution, which he takes as synonymous with the death of the tenant for life.

The principle to which the Master of the Rolls refers, he states to be, the desire of the Court to avoid a construction so inconvenient as one which must suspend the absolute vesting of the gift during the whole lifetime of the legatee, a principle which, he says, influenced Lord *Brougham* in his decision of the case of *Home* v. *Pillans* (1). With regard to the case of *Home* v. *Pillans*, it will be found, when I examine it, to have no application whatever to bequests of the kind which we are now considering, and I am not aware of any principle such as the Master of the Rolls refers to, being applied to control the natural meaning of the terms of a bequest. In the second class of cases referred to by the Master of the Rolls, the gift continues defeasible during the whole life of the legatee; and in cases like that before your Lordships it would, even according to the construction of the Appellant, continue defeasible during the whole of the life of the legatee, supposing the legatee to be outlived by the tenant for life.

The Master of the Rolls, however, refers to decided authorities. These authorities are *Da Costa* v. *Keir* (2), *Galland* v. *Leonard* (3), and *Home* v. *Pillans* (1). In *Da Costa* v. *Keir* (2) the testator gave the residue of his estate to his widow for her life, and after her decease to a person whom I shall denote as *C.*, to and for her own use and benefit, to be at her own disposal, but if *C.* should happen to die, leaving any children living at her decease, then to such children; but if *C.* should happen to die without any child or children living at her decease, then to *D.* and *E.* equally; but if

(1) 2 My. & K. 15. (2) 3 Russ. 360. (3) 1 Sw. 161.

either should die before they became entitled to receive the residue of his estate, then the whole to the survivor; but if both should happen to die in the lifetime of the widow, then to his widow absolutely. There were, in this will, various circumstances pointing out the death of the widow as the period at which all the interests were to become indefeasible. In the first place the principal of the residue was given to *C.* "from and after the death of the widow, to and for her own use and benefit, to be at her own disposal;" a provision which appeared to negative any continuing defeasibility. In the next place, the gift over from *C.* was framed, either in case she should die leaving children, or in case she should die not leaving children. And inasmuch as she must of necessity die either leaving or not leaving children, the case was the same as those where the gift over is in the event of death *simpliciter*. Farther, the ultimate gift was, in case *D.* and *E.* should both happen to die in the lifetime of the widow, a provision which seemed to imply that the previous gifts over were meant to be in case of death in the lifetime of the widow. It was upon these particular expressions, peculiar to this particular will, and not upon any general rule of construction, that the Master of the Rolls arrived at a decision, which, as it appears to me, was in that case entirely justified by the words of the will.

With regard to the case of *Galland* v. *Leonard* (1) it is unnecessary to delay your Lordships by going through a narrative of the will. It is singular that there also, as in *Da Costa* v. *Keir* (2), there was a gift over in the double event of either leaving or not leaving children, and there was a provision that the children of a daughter should be entitled to the same share as their mother would have been entitled to "if then living," and it was upon these expressions, and on the general construction of the particular will, that the Master of the Rolls held that the daughters surviving the tenant for life took indefeasible interests.

The case of *Home* v. *Pillans* (3) was a case of an entirely different kind. There was there a bequest to the testator's nieces when and if they should attain twenty-one; and, in case of the death of either niece leaving children, or a child, the testator gave the share of the niece so dying to her children or child. This was not

(1) 1 Sw. 161. (2) 3 Russ. 360. (3) 2 My. & K. 15.

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the case of an absolute gift, with a gift over in a certain event. There was no gift over, and there was no gift at all until a niece attained twenty-one, and the child of a niece marrying and dying before twenty-one would have been wholly unprovided for if the Court had not held that the words "in case of the death of my said nieces or either of them, leaving children or a child," pointed to a death under twenty-one.

I am unable, therefore, to find in the authorities referred to by the Master of the Rolls the general rule of construction which he deduces from them.

I may add that there is a well-known class of cases referred to to by Mr. *Fearne* in his book on Contingent Remainders (1), and by other writers, where, with respect to executory devises of terms for years or other personal estates the Court of Chancery has been accustomed to lay hold of any words in the will to tie up the generality of the expression "dying without issue," and confine it to dying without issue living at the time of the person's decease. In several of these cases there has been a prior life estate, as in the case of *Atkinson* v. *Hutchinson* (2), but in none of them was it ever suggested that the words "dying without issue" or without leaving issue, could be construed as pointing to a death before the tenant for life.

My Lords, I need not refer in detail to cases decided since the case of *Edwards* v. *Edwards* (3), some of them have professed simply to follow *Edwards* v. *Edwards* (3), and among them is the case of *In re Heathcote's Trust* (4) now under appeal before, and about to be decided by, your Lordships. Another is the case of *Smith* v. *Spencer* (5), before Lord *Cranworth*, a case in which, if it is analogous to the present, the decision of *Edwards* v. *Edwards* (3) was certainly not followed.

I am unable to find, in any case prior to *Edwards* v. *Edwards* (3), any authority that the words introducing a gift over in case of the death unmarried or without children of a previous taker do not indicate, according to their natural and proper meaning, death unmarried or without children occurring at any time, or that this

(1) 9th Ed. p. 471.
(2) 3 P. Wms. 258.
(3) 15 Beav. 357; 21 L.J. (Ch.) 324.
(4) Law Rep. 9 Ch. Ap. 45; see the case *Ingram* v. *Soutten*, *post*.
(5) 6 De G. M. & G. 631.

ordinary and literal meaning is to be departed from otherwise than in consequence of a context which renders a different meaning necessary or proper.

I ought to observe, lest it should appear to have been overlooked, that at one period of the argument doubts were expressed whether under the present will the nephew, Colonel *L'Estrange*, having died in the life of the testatrix, the gift over from *Grace L'Estrange* could take effect. This point was not raised in the Court below, and I am satisfied that the gift to Colonel *L'Estrange* having failed by lapse, the residuary legatee is entitled to take all that Colonel *L'Estrange*, if living at the death of the testatrix, could have taken.

On the whole, I am of opinion that the present appeal should be dismissed with costs. My Lords, I say with costs, more particularly, because I observe that out of this legacy, not a large one at the best, the costs of litigation which came on two occasions before the Court below have already been paid; and if farther costs were to be paid out of the legacy, it would in effect be making the owner of the legacy pay the costs of both sides throughout the litigation.

LORD HATHERLEY:—

My Lords, I concur in the opinion expressed by my noble and learned friend. The case has been extremely well argued, and we have had the great advantage of a full argument in a subsequent case in which the circumstances are in a great degree similar to those in this case; and which therefore required the pointing out of the various authorities bearing upon a limitation framed as the limitation is in this will.

My Lords, the case of *Edwards* v. *Edwards* (1) has in point of fact been the substantial ground for the Appellant's argument in the case now before your Lordships. That case was recognised by the Master of the Rolls in *Ireland* (2), before whom the present case was originally argued, and, whether or not he intended to indicate that he decided this case in favour of the Appellants solely in reliance on that authority, or for what other reason he so decided it, does not fully appear; but I think there is a somewhat

(1) 15 Beav. 357; 21 L. J. (Ch.) 324. (2) 10 Ir. Ch. Rep. (N.S.) 14.

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peculiar reference in the judgment of the Master of the Rolls in *Ireland* to that particular case as an authority which he thought proper to follow. The Court of Appeal in Chancery in *Ireland* came to a different conclusion from the Master of the Rolls, and hence the appeal to this House.

My Lords, the question arose in the case of *Edwards* v. *Edwards* (1) upon a will which was very carefully drawn, and I say that advisedly, because I have read it through with care, although it is not necessary to go into it now in detail. There was, in that case, every ground for supporting the judgment independently of any general rule being deduced from the authorities which had been cited before the Master of the Rolls, and upon which he seems to have relied. With reference to the rule which has been conceived to have been established in that case, what, in point of fact, the Master of the Rolls was doing was this: in a case of some difficulty before him the various authorities had been cited (most of which have been cited on the present occasion), in which there was a gift apparently absolute first of all, and then a subsequent executory devise cutting down the first gift upon the occurrence of a subsequent event. The mode of expressing that was the subject of his consideration in the case of *Edwards* v. *Edwards* (1), as it is of ours in the case now before us.

The Master of the Rolls, therefore, reviewed all the authorities, and he said that those authorities appeared to him capable of being ranged under four different heads, the first being that in which there is a gift in apparently absolute terms to *A.*, but in case of his death a gift over, with no intermediate interest created in the will. A very early instance of that occurred in the case of *Atkinson* v. *Hutchinson* (2), in the middle of the last century. But in that case an expression importing contingency, but applied to a certain event like that of death, had to be applied to something different from that to which it might have had a more literal application. The words could not be considered to apply, as they would seem literally to apply, to death as a contingency, because that must be an absolute certainty; and, therefore, the contingency must be sought in something else which had occurred to the testator as a reason for so framing his gift.

(1) 15 Beav. 357; 21 L. J. (Ch.) 324. (2) 3 P. Wms. 258.

Therefore the only mode of construing it was to understand the testator as saying, "This contingency referred to the case of *A.'s* death during my (the testator's) lifetime, in which case the legacy would remain undisposed of, and I therefore provide that in that event it shall go over to another." Then comes a subsequent case, a gift to *A.*, apparently absolutely, and on his death without leaving any children, then over. Here the Courts have at all times held, and the Master of the Rolls so states in *Edwards* v. *Edwards* (1), that that affords a sufficient indication that the words "in case of his death without leaving issue," or "without leaving children," as the case might be, were to extend to the whole period of the first taker's interest. Although he would apparently, by the terms of the gift itself, and did indeed in point of law, take absolutely, yet there was an executory devise over, that might take effect at his death when the contingency should be ascertained whether he died childless or not.

My Lords, I pause here to say that I entirely concur in the remark which was made by the noble and learned Lord on the woolsack with reference to the earlier decisions in cases of that character, namely, where there is a gift to *A.* positively, and in the event of his death without issue, to *B.* Before the last *Wills Act* such a gift as that was held to confer an interest which could not be defeated during *A.'s* life. A gift over on failure of issue would have been a gift sinning against the rule with reference to perpetuities, if it had to be construed as meaning an indefinite failure of issue, and consequently the gift would have become abortive. The Courts, then, as my noble and learned friend has stated, were astute to find upon the face of the will something which could induce them to say: This does not mean an indefinite failure of issue, but issue failing at the time of the death of the person who was the first taker; and that being the case, it falls within the proper limitation, of course, as to time. I say they were astute in doing that, as everybody will well know who recollects the singular distinction that was established between gifts of personalty, in which the words "dying without leaving issue" occurred, as contrasted with similar devises of realty. The same terms in the case of realty were held to create an estate tail,

(1) 15 Beav. 357; 21 L. J. (Ch.) 324.

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that is to say, death without leaving issue imported an indefinite failure of issue; whereas in personal estate the words "without leaving issue" meant at the time of the death. So far was that carried, that in one well-known case, these same words occurring in one and the same will, had two different meanings given to them, in the one case applying to real, and in the other to personal estate (1). Now it is very remarkable that if this supposed rule in *Edwards* v. *Edwards* (2) had been thought of as a rule, many cases might have been saved by the construction that death without issue, after a previous life estate, could be held to mean without issue in the lifetime of the tenant for life, because then the perpetuities would be saved, and the gift over would have a construction which is perfectly legitimate, and which would have its full and complete effect. But no such cases will be found in any of the earlier decisions upon the subject.

The third case put forward by the Master of the Rolls was one in which there was a previous life estate. The second case that he took was one in which there was no previous life estate, and then a gift over without issue, and he said that it had always been held that that gift over without issue was to be determined on the death of the original first taker to whom an absolute interest had been given, and whose absolute interest would be cut down by that executory devise if he should be found to have left no children. He says that that was the right and proper construction to adopt. If so, it seems to me that there is no reason for distinguishing the fourth rule from the second, namely, that the proper time for ascertaining whether the death without issue is to have the effect of passing over the property, should be taken to be the period of the death itself, at which time, and which alone, it can be accurately ascertained whether the person so dying will have left issue or not.

But what appears to have led the Master of the Rolls to enunciate that rule was this: In the case of personal estate there has, no doubt, been a great desire on the part of the Courts to favour an early vesting, and more particularly in the case of a gift over without children, where there is no gift to the children themselves,

(1) *Quære*, *Hutchinson* v. *Stephens*, 1 Keen, 240.

(2) 15 Beav. 357; 21 L. J. (Ch.) 324.

and where, therefore, the only mode of the children taking is through the medium of their parents taking. And in cases where the contingency was in the event of there being children born, it has been held that the vesting has given the parent an immediate interest defeasible in the event of there not being children living at his decease, but as those children who had been born during his lifetime would have been left a long time unprovided for, the Court has laid hold of that circumstance, among others, for the purpose of favouring the early determination of the contingency which was to divest the estate.

So again, I apprehend, in another class of cases, many of which were cited before us, which have been decided since *Edwards* v. *Edwards* (1), one of them having been before myself; in those cases where the Court has found upon the face of the will a positive direction to pay over the personalty to the legatee, or to make a distribution among several legatees at a given time, the period of distribution being fixed at which, as it appears from the face of the will, the whole estate was intended to be entirely disposed of and divided, and to pass from the hands of the executors, the Courts have laid hold of that circumstance to say, "We hold this defeasance to be before that period of distribution arrives," holding it to be an unreasonable construction of the testator's will to say that he directed on the one hand that the money shall be absolutely paid and divided and distributed, and put into the hands of those who, having it in their hands, will of course spend it without any farther trust, and on the other hand that a subsequent event, namely a certain person's dying childless after that distribution has taken place, should divest the property, that is to say, make it necessary for the executor to take steps to get back again, and recall that money which he has paid in order to hand it over to those who would take under the executory devise. The Courts have held that that was unreasonable. In the case I alluded to it was a trade, which was directed to be carried on by the executors until the son attained a certain age, when the trade (and not the trade only, but other property as well) was to be handed over to him, and then there was what appeared to be a divesting executory devise in the event of his dying without issue. I held in that case, and I should

(1) 15 Beav. 357; 21 L. J. (Ch.) 324.

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be disposed to hold the same again if a similar case came before me, that the time was evidently pointed out when the final and complete distribution was to be made, and that the executory devise must be held to be referred to that time, because it was impossible to call the property back again and hold that the executory devise was then to take effect after there had been that full and complete distribution of the funds.

Now, my Lords, I have read all the cases since the argument in this case, and certainly in far the larger proportion of the cases which have been cited, that decision in *Edwards* v. *Edwards* (1) has been referred to as settling and well establishing the rule; but there has always been, I think, on the part of every Judge, a saving of the other circumstances which might appear on the will, the Court having always carefully to consider the whole will, and, having regard to all the various clauses contained in it, to see what is the full and complete and perfect intention of the testator. I apprehend, my Lords, that the rule referred to by the Master of the Rolls may be more correctly stated in somewhat the reverse way to that in which it was stated by him in the case of *Edwards* v. *Edwards*, namely, that the period to which the executory devise will be referred will be the period of the death of the first taker, unless there are other circumstances and directions in the will which are inconsistent with that supposition. The Master of the Rolls has rather put it in the other way, that an executory devise is to take effect upon a person dying without children during the period of the first antecedent estate unless there are circumstances to be found in the will to the contrary. I apprehend that the reverse mode of putting it will be the more correct mode of expressing the true state of the case.

In the particular case here before me I find nothing to favour a contrary construction to that of extending the period of the contingent character of the estate to the whole period of the life of the original legatee. It is simply a case of a legacy, first to the wife of Colonel *L'Estrange*, and then to her daughter *Grace*, and then if *Grace* dies without children to revert (that is the expression) to Colonel *Henry L'Estrange*, her brother. I would not lay much stress upon the word "revert;" but so far as any stress can

(1) 15 Beav. 357; 21 L. J. (Ch.) 324.

be laid upon it, it certainly does rather favour the contrary construction to that which I hold to be the primary construction. But, feeling as I do, that you ought to find something in the will which limits the contingency to less than the whole life of the first taker before you can so limit it, I find nothing of the kind, and therefore I agree with my noble and learned friend on the woolsack that the appeal should be dismissed. And I agree with him also in thinking that considering all that has been done in regard to the costs which this fund, already sufficiently small, has borne, it should be dismissed with costs.

LORD SELBORNE :—

My Lords, I am of the same opinion with my noble and learned friends.

The Master of the Rolls, in *Edwards* v. *Edwards* (1), had before him a case in which a distribution by assignment or transfer was expressly directed to be made after the death of the tenant for life ; thereby *primâ facie* terminating a trust which down to that time was to continue. His Lordship, in classifying, and deducing rules from, the previous authorities to which he referred, did not advert expressly to the distinction between such a case and one like that now before us, in which a mere succession of interests is provided for, without any such express words of payment, assignment, or distribution, indicating the termination of a trust. But the terms in which he states the rule derived by him from the two cases of the fourth class to which he refers—*Da Costa* v. *Keir* (2) and *Galland* v. *Leonard* (3)—are these, that " words, indicating death, without leaving a child, as the event on the occurrence of which the gift over is to take effect, must be construed to refer to the occurring of that event before the period of distribution." In one of the two cases from which he so deduced this supposed rule (*Galland* v. *Leonard* (3)), there was an actual distribution and winding-up of the trust expressly directed by the testator. In the other (*Da Costa* v. *Keir* (2)) there was evidence of an intention that the legatee should in some event take an abso-

(1) 15 Beav. 357; 21 L. J. (Ch.) 324.
(2) 3 Russ. 360. (3) 1 Sw. 161.

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lute interest; which intention must have been wholly defeated if the divesting clauses could not be referred to a period earlier than the death of the legatee. And the general result of his Lordship's examination of the authorities is thus stated at the end of that judgment (1): "If I am right in the view which I take of the principle of these cases, the effect is, as it appears to me, that the rule of the Court is that the contingency, or the event which the testator speaks of as a contingency, is always referable to the period of payment or distribution, except in the single case where there is a simple gift to *A.*, and, if he shall die without leaving issue, to *B.*, in which case it cannot be referred to any period of distribution."

It is manifest that when a testator (as in *Galland* v. *Leonard* (2)) has directed payment or distribution to be made at a certain time, so that a trust, intended by him to continue until that time, shall then come to an end, and has proceeded to substitute other devisees or legatees through the medium of the same trustees and the same trust, in case of the death, without leaving issue, of any of the persons to whom such payment or distribution was first directed to be made; there is strong *primâ facie* reason for holding that the contingency must be intended to happen, if at all, before the period of distribution. And a rule so limited (subject of course to exceptions resulting from any particular words indicative of a contrary intention) would seem to be in harmony with sound principle and with the general current of authority.

A like conclusion may also *primâ facie* be arrived at when the language of a will shews (as in *Da Costa* v. *Keir* (3)) that the legatee was intended, in some event, to take an absolute interest, and when that intention cannot in any event receive effect unless the operation of such a divesting clause is limited to a time earlier than the legatee's death. Almost, if not absolutely, all the cases in which the fourth rule laid down in *Edwards* v. *Edwards* (4) is found to have been applied, or referred to with approval, before the decisions now under appeal, will be seen, upon examination, to come within one or the other of these two categories.

I cannot, therefore, think that either the authorities prior to

(1) 15 Beav. 366.
(2) 1 Sw. 161.
(3) 3 Russ. 360.
(4) 15 Beav. 357; 21 L. J. (Ch.) 324.

Edwards v. *Edwards* (1), or that case itself, or any by which it has been followed, are sufficient to establish a general rule for the construction of all wills, when neither the reasons applicable to the two classes of cases which I have mentioned, nor any other reasons founded on the language of the particular will, may justify its application. It seems to me that it would be arbitrary, and in fact a *petitio principii*, to apply the phrase "period of distribution" (itself an equivocal term, which may mean either an apportionment of interests by the will, or a direction to trustees to divide and hand over a fund) to a case in which there is merely a particular estate (such as a life interest) followed by a limitation over to *A. B.*, his heirs or executors, liable to be divested if, for example, *A. B.* dies without leaving issue living at the time of his death. The testatrix has not said that the fund is to be distributed, nor that the trust is to come to an end, upon the termination of the particular estate; nor can I perceive on what ground that which she has not said ought to be implied. The words of contingency are clear and sensible as they stand, and nothing needs to be added or implied for the purpose of giving them full effect. The reasons assigned by Lord *Romilly* for his second rule in *Edwards* v. *Edwards* (1), seem to me to be not less applicable to such a case than to the particular class of cases which that second rule supposes; and I think it is the true result of the authorities, before *Edwards* v. *Edwards* (1), that in such a case, words limiting, by an unnecessary implication, the duration of the contingency on which the divesting clause depends, ought not to be added to the will.

This disposes of the appeal now before us, unless it can be held that the gift to *Grace L'Estrange*, the niece, being absolute in form, never became subject to the divesting clause, because the contingent gift by the clause was to a person who died in the testatrix's lifetime. When the appeal was first opened, I doubted whether, under these circumstances, the effect of the divesting clause was not wholly evacuated, in the same way as if there had been a blank in the will for the name of the substituted legatee. But the result of the preliminary argument on that point, and of the authority cited by the Respondent, has been to satisfy me that

(1) 15 Beav. 357; 21 L. J. (Ch.) 324.

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the lapse of a contingent gift, by way of substitution, to a person named who might have survived the testatrix, operates (when the contingency has happened on which the gift to the person was made to depend) for the benefit of the residuary legatee, or next of kin, in the same way as if the gift had been originally made to the same person, free from any contingency.

Order appealed from affirmed; and appeal dismissed, with costs.

Lords' Journals, 24th July, 1874.

Solicitor for the Appellant: *Thomas Johnstone.*
Solicitor for the Respondents: *H. Shoubridge.*

[*See the next case.*]

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July 16, 21.

W. H. INGRAM AND J. RAINIER McQUEEN . APPELLANT;

AND

BENJAMIN SOUTTEN . . . . . RESPONDENT.

Will—"Dying without leaving issue living at the time of her decease."

20 Eq. 202-3
16 Ch. D. 346-7
346
4 Ch. D. 134
6 Ch. D. 604-5
606-9
7 Ch. D. 259

A will contained bequests to daughters, failing whom and their issue living at their deaths, to sons, failing whom and their issue living at their deaths, to "*Mary H.* her executors, &c., and in case *Mary H.* shall depart this life without leaving any issue of her body living at the time of her decease" over:—

Held, that the natural meaning of these words was, the dying of *Mary H.* without issue living at the time of her death, at whatever time that death might happen; on that event happening the fund went over.

And that there was no technical rule of construction which prevented the words from being applied according to this their natural meaning.

The rule of construction, known as the fourth rule, stated in *Edwards* v. *Edwards* (1), overruled.

[*See the preceding case.*]

THIS was an appeal against an order of the Lords Justices which had reversed a previous order of Vice-Chancellor *Malins* (2). The question arose on the will of *Robert Heathcote*, dated the 10th of

(1) 15 Beav. 357; 21 L. J. (Ch.) 324.
(2) Law Rep. 9 Ch. App. 45, *nom. In re Heathcote's Trusts.*

January, 1811, which, after bequests and devises, not now necessary to be mentioned, directed his trustees to stand possessed of various stocks and funds on trust to pay the dividends, &c., unto his wife for her life or widowhood. And as to the residue, after her decease or second marriage to pay one moiety unto his daughter *Mary Ann Heathcote* for her separate use during her life, and the other moiety to his daughter, *Maria Heathcote*, for her separate use during her life. And after the decease of each of his daughters, for the benefit of her children. If either daughter should have no child, her moiety to go to the other daughter and her children; and then came the proviso on which the question turned:

"Provided that if neither of my daughters *Mary Ann* and *Maria* shall have any child who being a son shall attain twenty-one, or being a daughter shall attain that age or be previously married, then the trust moneys, &c., shall be upon trust for *William Samuel Heathcote* and *George Deare Heathcote* equally, &c. But, in case either of my sons shall depart this life without leaving issue of his body, lawfully begotten, *living at the time of his decease*, then the whole of the said trust moneys, &c., shall thenceforth devolve and be upon trust for the other of my said sons, his executors, &c. But in case both of my said sons shall depart this life *without leaving issue* of their respective bodies, lawfully begotten, *living at their respective deaths*, then the said trust moneys, &c., shall be upon trust for *Mary Heathcote*, spinster (being the natural daughter of my said son, *William Samuel Heathcote*, and now residing with me), her executors, &c.; but, in case the said *Mary Heathcote* shall depart this life *without leaving any issue of her body*, lawfully begotten, *living at the time of her decease*, then the said trust moneys, &c., shall be upon trust for such one or more of the daughters of my brothers-in-law, *Philip Deare* and *George Russell Deare*, respectively, now living, or hereafter to be born, as shall be living at the time *when the trusts hereinbefore declared shall determine*, their executors, &c. And if there shall be no such daughter of either of them, the said *Philip Deare* and *George Russell Deare, at that time living*, then the said trust moneys, &c., shall be upon trust for *Charles Deare*, his executors, &c., for ever."

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The testator died in 1818, leaving his wife, his two daughters, his two sons, and *Mary Heathcote* him surviving. The wife died in 1823, *Maria Heathcote* died unmarried, *Mary Ann Heathcote* survived and married Mr. *Angelo*, but died in 1866, without issue. The two sons had died before them, without lawful issue. *Mary Heathcote*, named in the will, who had, in April, 1859, married *Benjamin Soutten*, the present Respondent, then succeeded to the property. She never had any issue, and she died on the 8th of April, 1872. There was at that time no daughter of *George Russell Deare*, but there was then living *Elizabeth*, a daughter of *Philip Deare*, who had married Admiral *John Spratt Rainier*. This lady died on the 9th of April, 1872, just one day after Mrs. *Soutten*. The Appellants were Mrs. *Rainier's* executors.

On the 8th of March, 1873, the Appellants presented a petition in Chancery, submitting that, in the events which had happened, the death of Mrs. *Soutten* was the time when the trusts declared by the will determined, and that they as executors of Mrs. *Rainier* were entitled to the fund. The petition came on for hearing before Vice-Chancellor *Malins*, who, on the 25th of July, 1873, made an order in accordance with its prayer.

A petition for rehearing, by way of appeal, was presented by Mr. *Soutten*, and the cause came on to be heard before the Lords Justices, who reversed the Vice-Chancellor's order, being of opinion that the fourth rule declared in *Edwards* v. *Edwards* (1) was applicable in the case.

This appeal was then brought.

Mr. *John Pearson*, Q.C., and Mr. *A. P. Whately*, for the Appellants:—

There may be cases in which the rules supposed to be declared in *Edwards* v. *Edwards* (1) are applicable, but this case is not one of them. It is unnecessary, therefore, to go the full length of contending that that case cannot be supported. But at the same time it is difficult to find authority for it in principle or in precedent. The older authorities certainly do not justify it. No such doctrine was laid down in *Atkinson* v. *Hutchinson* (2), nor in

(1) 15 Beav. 357; 21 L. J. (Ch.) 324. (2) 3 P. Wms. 258.

Wilkinson v. *South* (1), or can fairly be deduced from those cases, or from *Crook* v. *De Vandes* (2). In the last-named case the word used was "heirs," and the failure of heirs was left in the most indefinite form as to the period at which the failure was to be ascertained, but it was there said that if the expression had been "if he leaves no such heirs," the limitation would have been good, as being confined to the time of the death, and as not implying an indefinite failure of heirs. In that distinction (these words really fixing the period), which was not sufficiently attended to in *Edwards* v. *Edwards* (3), lies the explanation for the apparent difference among the decisions on this subject. *Everest* v. *Gell* (4) is an instance of the same kind. The supposed rule is not warranted even by the cases on which it presumes to be founded: by *Da Costa* v. *Kier* (5), for there the death of testator's widow was the period contemplated for the absolute vesting of the legacy; nor by *Home* v. *Pillans* (6), for there the time of the vesting was plainly fixed by the testator to be the arriving at twenty-one; nor did *Galland* v. *Leonard* (7) lay down any such rule, for there the express direction was to pay and divide between the daughters the trust moneys upon the death of the widow, and the daughters' children were made to stand in the place of their mothers, and the moneys were to be paid to them as if to their mothers—when? why, of course, upon the death of the widow; and, of course, on the death of the widow the interest of the daughters absolutely vested. *Dean* v. *Handley* (8) cannot be said to support *Edwards* v. *Edwards* (3); it followed without expressly affirming that case, and merely decided that where the rule there stated is applicable to the whole of an income, it is applicable also where a part only is disposed of. In *Davenport* v. *Bishopp* (9) the gift to the children of *A.* and *B.* was limited to those who were living at the deaths of *A.* and *B.* The learned Judge who decided *Edwards* v. *Edwards* (3) could not have attributed to it the meaning now

(1) 7 T. R. 555. See *Doe* d. *Sheers* v. *Jeffery*, Ibid. 589.
(2) 9 Ves. 197.
(3) 15 Beav. 357; 21 L. J. (Ch.) 324.
(4) 1 Ves. Jun. 286.
(5) 3 Russ. 360.
(6) 2 My. & K. 15.
(7) 1 Sw. 161.
(8) 2 H. & M. 635. 11 Jur. N.S. 686
(9) 2 Y. & C. Ch. 451; 12 L. J. (Ch.) 492.

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sought to be affixed to it; for though in *Slaney* v. *Slaney* (1), where he appeared to follow it, he added that "it did not lay down that a testator might not direct otherwise." In the subsequent case of *Milner* v. *Milner* (2), he did not follow *Edwards* v. *Edwards* (3), because of the peculiar words of the will, and he repeated the observation that all general rules were subject to have their operation excluded by the use of exact words expressing the intention of a testator. In *Smith* v. *Spencer* (4) Lord *Cranworth* did not follow the rule in *Edwards* v. *Edwards* (3), nor can *Ware* v. *Watson* (5) be said to do so; for, as Lord *Hatherley* observed in *Bowers* v. *Bowers* (6), Lord Justice *Turner's* decision in that case had been founded on the peculiarities of the will then before the Court; and *Bowers* v. *Bowers* (6) followed a different rule. The true construction here, and the only one that will not defeat the plain intention of the testator, is, that in the events that happened the trusts did not determine until the death of *Mary Heathcote* (Mrs. *Soutten*), without children living at her death, and that on that event happening, the fund went over to Mrs. *Rainier*, in whom it became absolutely vested: *Farthing* v. *Allen* (7), *Salisbury* v. *Petty* (8), *Gosling* v. *Townshend* (9), and *In re Hill's Trusts* (10), were also cited.

Mr. *Cotton*, Q.C., and Mr. *Hubert Lewis*, for the Respondent:—

The decision of the Court below is in accordance with principle, and has followed a rule of law always if possible adopted by the Courts to prevent the undue postponement of the vesting of property. In no way whatever does the application of that rule defeat the intention of the testator. The gift to *Mary Heathcote* here is absolute, and there are no words of subsequent defeasance of her estate. The words really used apply only to her death during the life of the preceding possessor, the tenant for life. Under such circumstances the rule in *Edwards* v. *Edwards* (3) was properly adopted. That rule was not for the first time laid

(1) 33 Beav. 631.
(2) 34 Beav. 276.
(3) 15 Beav. 357; 21 L. J. (Ch.) 324.
(4) 6 De G. M. & G. 631.
(5) 7 De G. M. & G. 248.
(6) Law Rep. 5 Ch. App. 244, 249.
(7) 2 Madd. 310.
(8) 3 Hare, 86.
(9) 17 Beav. 245.
(10) Law Rep. 12 Eq. 302.

3 Jur. N.S. 193.

down in that case, and its object was to prevent the unnecessary postponement of vesting. Nothing but the clearly expressed intention of the testator ought to produce a different result. There not only was no such clearly expressed intention here, but as far as the words went they pointed to an absolute vesting of the property the moment the bequest to *Mary Heathcote* came into operation, and that was on the death of the tenant for life. This was personal property, and the gift was to her executors, administrators, and assigns. This was equivalent to a direction to pay, and wherever such a direction has been expressed the gift has been treated as absolute. *Edwards* v. *Edwards* (1) was founded on the rules adopted in *Home* v. *Pillans* (2). It was considered, and not in the least degree impugned, in *Randfield* v. *Randfield* (3), where Lord *Kingsdown* distinctly expressed his approval of it (4). *Home* v. *Pillans* (2) itself was cited there and commented on, and no one appeared even to doubt the rule that where there is an absolute gift it cannot be cut down by a subsequent proviso, unless the proviso is perfectly clear in itself, and is necessary to be acted on in order to make the whole provisions of the will consistent with each other. In *Dean* v. *Handley* (5) the rule in *Edwards* v. *Edwards* (1) was deliberately adopted, and applied to a case where a life estate was given in a portion of the whole income, but the whole, together with accumulations, was given (subject to a death without issue) upon the determination of that estate. So again in *In re Hill's Trusts* (6), the rule in *Edwards* v. *Edwards* (1) was, after full consideration, recognised and adopted, the Vice-Chancellor describing it as "a very sound rule," and no appeal has ever been brought against that decision. Though the judgment of the Court in *Bowers* v. *Bowers* (7) appears to be unfavourable to *Edwards* v. *Edwards* (1), an examination of the case shews that the Judge proceeded entirely on the words of the particular will, for Lord Justice *Giffard* there said (8), "I quite agree with what has been laid down by the Master of the Rolls in

(1) 15 Beav. 357: 21 L. J. (Ch.) 324.
(2) 2 My. & K. 15.
(3) 8 H. L. C. 225.
(4) 8 H. L. C. 240.
(5) 2 H. & M. 635. 11 Jur. N.S. 686
(6) Law Rep. 12 Eq. 302.
(7) Law Rep. 5 Ch. App. 244.
(8) Law Rep. 5 Ch. App. 251.

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Edwards v. *Edwards* (1)." In *Milner* v. *Milner* (2) the rule itself was again considered by the Master of the Rolls, and adhered to as a rule, but the decision there proceeded on the particular words of the deed, and therefore, though the word "absolutely" was used with reference to the gift to *Thomas*, the whole context of the deed was taken to shew that *Thomas* did not become absolutely entitled on the death of the settlor. In *Gosling* v. *Townshend* (3) and *Slaney* v. *Slaney* (4) the Master of the Rolls deliberately adhered to the rule he had laid down in *Edwards* v. *Edwards* (1), and any cases which appear not to follow that rule, can be fully accounted for by differences in the words of a particular will.

The great inconvenience of postponing the vesting of a legacy has always been recognised, and therefore it has been a rule of the Courts that where there are two terms to which the Court could refer for the vesting of a gift, the earlier period will be taken for that purpose. *Home* v. *Pillans* (5) proceeded on that principle, and has always since been approved. *Cooper* v. *Cooper* (6) did not impeach that principle, for there the gift to the testator's children was by the words of the will itself clearly intended only to be a life estate. The observations of Lord *Hatherley* in *Bowers* v. *Bowers* (7), as to Lord Justice *Turner's* judgment in *Ware* v. *Watson* (8), explain exactly the grounds of his Lordship's decision, namely, that he does not there adopt the rule as to absolute vesting of the property, because he thinks the peculiar words of the will there do not permit that rule to be applied. But he throws no doubt upon the principle that where there is an absolute gift it can only be afterwards cut down by a clear and unquestionable expression of an intention to that effect. There was such an expression in that case, there is none such here. *Smith* v. *Spencer* (9) does not appear to have been cited in either of these cases, though it has been relied on here; but it is not to be treated as an authority here. The discussion and the judgment do not appear to have been influenced by any consideration of more than the mere words of the

(1) 15 Beav. 357; 21 L. J. (Ch.) 324.
(2) 34 Beav. 276.
(3) 17 Beav. 245.
(4) 33 Beav. 631.
(5) 2 My. & K. 15.
(6) 1 K. & J. 658.
(7) Law Rep. 5 Ch. App. 249.
(8) 7 De G. M. & G. 248.
(9) 6 De G. M. & G. 631.

will itself. There are no words here which shew the testator's intention to give a defeasible interest to *Mary Heathcote*, but there are words which do lead to the conclusion that he intended the gift of the fund to her should be absolute.

Mr. *Whateley* replied.

THE LORD CHANCELLOR (Lord *Cairns*):—

My Lords, in this case *Robert Heathcote*, the testator, by his will, dated in 1811, gave his residuary estate to his wife for her life, and after her death or second marriage to pay the income of one-half to his daughter *Mary*, and of the other half to his daughter *Maria* during their lives, and after the death of each to hold her moiety on trust for her children; if no child or children, her moiety for the other daughter and her children; and if neither daughter should have a child attaining a vested interest, then to his sons as tenants in common; but in case either of his sons should die without leaving issue lawfully begotten living at the time of his death, then the whole thenceforth to devolve and be upon trust for the other son. But in case both sons should die without leaving issue living at their respective deaths, then upon trust for *Mary Heathcote*, spinster (a granddaughter of the testator), absolutely; but in case she should die without leaving issue living at the time of her death, then on trust for such one or more of the daughters of *Philip Deare* and *George Russell Deare* as should be living at the time when the trusts thereinbefore declared should end, equally to be divided between them.

The two daughters and the sons survived the wife, and died without issue, and the question now arises between the Respondent, who represents *Mary Soutten*, formerly *Mary Heathcote*, who died without issue on the 8th of April, 1872, and the Appellants, who represent the daughter of *Philip Deare*, who died on the 9th of April, 1872, one day after *Mary Soutten*. The Vice-Chancellor *Malins* decided in favour of the Appellants, but this decision was reversed by the Lords Justices by the decree now under appeal.

So far as the words of this will are concerned, I have found nothing whatever in it qualifying the natural meaning of the words, "in case *Mary Heathcote* shall depart this life without leaving any issue of her body lawfully begotten living at the time

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of her decease," and the various other similar expressions in the will. These words appear to me clearly to express a dying without issue living at the death, at whatever time that death may take place; and framed, as this will evidently is, by a professional hand, and in technical language, I am not aware of any words that could have been used more clearly pointing to death at any time. On the other hand, the construction adopted by the Lords Justices requires us to read in (as the Lord Justice *James* admits) the words "before the period of distribution" wherever the word "death" occurs. The Lord Justice *James* proceeds upon the authority of the case of *Edwards* v. *Edwards* (1), and he states that the rules laid down in that case are simple, intelligible, and very beneficial in the administration of testator's estates. The Lord Justice appears to treat these rules as absolute rules of construction, to be applied unless there is something repugnant to them in the particular will; and he adds (2): "I carefully abstain from referring to any expression in the will which seems to support this view, lest it should be argued hereafter that our decision went on the particular words of the will. I go on this ground, that the rule applies unless there are words in the will to prevent its application, and that in this will there are not any words to take the case out of the general rule."

My Lords, in the case from *Ireland* of *O'Mahoney* v. *Burdett* (3), just now disposed of by your Lordships, I have stated at length the reasons why, if what is termed the fourth rule in *Edwards* v. *Edwards* (1) was meant to be laid down as a rule of construction, without regard to expressions in the particular will requiring such a construction, I am unable to accede to a rule the effect of which would be to alter the natural meaning of words, and I do not repeat the observations upon the authorities which I then laid before your Lordships. I can find nothing whatever in the context, or in the general scope of the provisions, of this will which leads me to think that the words pointing to the death of *Mary Soutton* without issue living at the time of her death, are to be construed as pointing to her death otherwise than as at whatever time it may occur.

(1) 15 Beav. 357; 21 L. J. (Ch.) 324.

(2) Law Rep. 9 Ch. Ap. 51.

(3) *Ante*, p. 388.

I therefore submit to your Lordships that the order of the Lords Justices of the 20th of November, 1873, ought to be reversed and the case remitted to the Court of Chancery, with a declaration that the gift over under the will of the testator upon the death of *Mary Soutten*, formerly *Mary Heathcote*, without leaving issue of her body, lawfully begotten, living at the time of her decease, took effect.

But this is not to disturb any order made by the Court of Chancery for payment of costs or charges and expenses out of the fund. I mention this last point, because, subject to any correction which may be made by the learned counsel, it appears to me, looking at the orders, that there has been some arrangement made in the Court of Chancery for the payment of the costs generally out of the fund; and if so, I should not propose that your Lordships, in reversing the decree of the Lords Justices, should interfere with what has been done there with regard to costs.

LORD HATHERLEY:—

My Lords, I take exactly the same view of this case as that which has been taken by my noble and learned friend on the woolsack, and I do so for the reasons which I have given in the former case.

I look in vain in this will for any indication which should vary what seems to me to be the proper construction of the words, "dying without children," or, as it is expressed here, "in case of their departing this life without leaving issue of their respective bodies lawfully begotten living at their respective deaths." That is the character of the limitation that runs through the various heads under which the devolution of this testator's property is to take place. So far from finding any direction for the immediate payment, and handing over by the trustees of the fund which is in their hands, and thereby acquitting themselves of their trust at once by parting with the property to those to whom it is given, I find a carefully-framed series of limitations, studiously drawn throughout the whole series in such a manner as to exhaust any possible contingency which may happen before there is any final distribution of the property. When such a contingency happens,

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as the death of either of the testator's sons without leaving issue lawfully begotten living at the time of his death, then it is directed that the whole of the money shall thenceforth be upon trust for the other son, and so on, passing from one limitation to another. Then when you come down to *Mary Heathcote*, near the final termination of the limitations, you have this direction, "In case the said *Mary Heathcote* shall depart this life without leaving any issue of her body lawfully begotten living at the time of her decease, then the said trust moneys," and so on, "shall be upon trust for such one or more of the daughters of my brother-in-law, *Philip Deare*, Esquire, and the said *George Russell Deare*, respectively, now living or hereafter to be born, as shall be living at the time when the trusts hereinbefore declared shall determine, to be equally divided between or amongst such daughters." The testator contemplates, therefore, this state of things, that the whole of the previous series of trusts for persons to take absolutely, whose interests are to be divested by their deaths without leaving children, shall have been gone through before the property devolves on the daughters of the *Deares;* and then comes this direction, "And if there shall be no such daughters of either of them the said *Philip Deare* and *George Russell Deare* at that time living, then the said trust moneys," and so on, "shall be upon trust for the said *Charles Deare*, his heirs, executors, administrators, and assigns for ever." There and there alone the trusts terminate.

There is no particular period whatever at which you can say that the funds are absolutely to be handed over unless you arrive at the event on the occurrence of which of course the trust will naturally terminate. If any one of those persons whose interest is absolute dies leaving children living at his decease, that, of course, will put an end to the trust, but until the moment arrives when that event happens the trust is not finished, the fund remains in the hands of the trustees, and there is no direction that it shall be divided. Therefore each taker must hold liable to the divesting which the testator said was to take place in the event happening which he pointed out.

LORD O'HAGAN :—

My Lords, I am of the same opinion. I abstained from taking

part in the consideration of the case of *O'Mahony* v. *Burdett* (1), because in one of its stages it had come before me in the Court of Chancery Appeal in *Ireland*, but, having given considerable attention to the arguments urged before your Lordships in that case, I quite adopt the conclusion at which you have arrived. That conclusion manifestly governs the present case; and the reasons which sustain it,—which after the elaborate statement we have heard I do not think of repeating,—are applicable here and ought, *à fortiori*, to prevail upon the facts before us.

In *O'Mahoney* v. *Burdett* (1) the intention of the testator was tolerably clear; but here it is made far clearer by a succession of limitations carefully and accurately drawn, with the fullest deliberation, by persons acquainted with his real purpose, and competent to interpret it in proper language. Avoiding any idle repetition of the reasons already given, I wish to express my full concurrence in the view that there is really no such unyielding rule of construction as has been relied upon to coerce the judgment of the House. The decision of the Lords Justices now under appeal, did not proceed upon the language of the will or the intentions of the testator. It was assumed in that decision that the case of *Edwards* v. *Edwards* (2) established an absolute rule, which the Court was bound to obey. I have looked carefully into that case, and into the cases upon which it was founded; and I agree with my noble and learned friend that they furnish no real ground for any such assumption. They do not compel us to ignore the terms of the will and defeat the objects of the testator. In all of them the learned Judges will be found to have had regard to the particular words employed and to the general intention exhibited in the whole of the will. It does not appear to me to be desirable that we should multiply, without necessity, the rigid rules which sometimes compel us to give to words an interpretation which their authors would have repudiated. Although there are cases in which such rules have been established for such a length of time, and upon such high authority, that they cannot safely be relaxed or abandoned, I do not think that their masterful operation should be extended, when we are asked to effectuate a testamentary disposition, reasonably clear in its object and its terms, which they

(1) *Ante*, p. 388. (2) 15 Beav. 357; 21 L. J. (Ch.) 324.

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would antagonise in part or nullify altogether; and in the present case it does not seem to me that we are precluded from giving to language its natural interpretation.

Looking carefully to the circumstances founding the decision in *Edwards* v. *Edwards* (1), I do not think that it can be taken to rule the case before us. The *ratio decidendi* there does not, in my judgment, govern it at all. There, the necessity of distributing the fund at a particular period is repeatedly relied on as necessitating the decision; but such a ground has no application to this case or to that of *O'Mahoney* v. *Burdett* (2).

In a subsequent case before the same learned Judge (*Gosling* v. *Townshend* (3)), he puts the matter himself in this way: "Where a period of distribution is fixed, and the testator speaks of a death previous to that time, the death thus spoken of as a contingency must refer to that period of distribution. But if a testator gives a legacy to *A.*, but if *A.* die without leaving issue, then to *B.*, to what period can that be referred except to the whole period of *A.*'s life?" In like manner, it will be found that in several subsequent cases the Master of the Rolls put upon his decision in *Edwards* v. *Edwards* (1) a construction which does not warrant the use of it as an authority on the point we are now required to decide. And this being so, and the intention of the testator as to the period he meant to fix being plain, and stated deliberately, and with care and caution, we are bound to act on that intention, construing the words which declare it according to their ordinary sense.

Therefore, my Lords, I concur in the opinion that the judgment of the Court below should be reversed.

LORD SELBORNE:—

My Lords, the language of the Lord Justice *James* when he says, "I carefully abstain from referring to any expression in the will which seems to support this view, lest it should be argued hereafter that our decision went on the particular words of the will," produced upon my mind certainly the impression that we should hear from the learned counsel for the Respondents some passages pointed out in the will which might have justified an

(1) 15 Beav. 357; 21 L. J. (Ch.) 324.
(2) *Ante*, p. 388.
(3) 17 Beav. 245.

express inference of intention in accordance with the alleged rule. But, my Lords, I think we heard no such passages pointed out to the House, and I really am at a loss to know what parts of the will can have appeared to the learned Lord Justice to be capable of being referred to as supporting the application of the rule, and I feel some regret that, for the reason that he gave, he did not think fit to refer to them.

Reading the will myself, I entirely agree with what has fallen from one of your Lordships opposite (Lord *O'Hagan*), that so far as there is indication of a particular intention bearing one way or the other on the face of this will, it is wholly against the judgment which has been given in the Court below. Certainly there is a very marked absence of anything like an indication of an earlier period for the termination of the trust, than that which would be consistent with the longest duration of the time within which the contingency might take place, by which the divesting was to be produced. And I am disposed, my Lords, to go even a little farther, and to say that there is a clause in the will, the influence of which extends throughout the material portion of it, and which really according to the natural and literal meaning of the words justifies the observation that the testator did expressly contemplate that the divesting might take place after all the preceding interests had come to an end, and after the sons had been put into possession of the property. Because, my Lords, the first of the series of the alternative divesting clauses, or successive divesting clauses, whichever they ought to be considered, is in these terms:—"But in case either of my said sons shall depart this life without leaving issue of his body lawfully begotten living at the time of his decease, then the whole of the said trust moneys and premises shall thenceforth devolve and be upon trust for the other of my said sons, his executors, administrators, and assigns." I do not say, my Lords, that there would be a necessary implication in those words that if the event had happened before the funds became vested in possession in the sons, it would go over to the survivor. But this I think I am entitled to say, that the state of things expressly contemplated by those words is one in which the previous trusts for the tenant for life, and the issue of the tenant for life, have come to an end, and in which the only trust to be considered is one in

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possession in favour of the sons, so that upon the death of one of the sons, *eo instanti* the whole of the trust moneys may at once devolve to, and be upon trust for, the other, which event could only happen after the time which the Lords Justices have here treated as the period of distribution.

My Lords, I entirely concur in the judgment which has been moved.

Mr. *Pearson*:—Perhaps your Lordships will allow me to say with reference to the question of costs, that the inference which one of your Lordships drew is perfectly accurate, namely, that the payment of the costs out of the fund in the Court below was done with the consent of both parties; and accordingly your Lordships will observe that the appeal is expressly limited so as not to apply to so much of the order as relates to the question of costs.

Ordered that the order of the Lords Justices of the 20th of November, 1873, *be reversed. And it is declared that the gift over under the will of the testator, Robert Heathcote, upon the death of Mary Soutten (formerly Mary Heathcote) without leaving issue of her body living at the time of her death, took effect. And that the cause be remitted, &c.*

Lords' Journals, 24th July, 1875.

Solicitors for the Appellant: *Birch, Ingram, Harrison, & Co.*
Solicitor for the Respondent: *Welbury James Mitton.*

JUNIUS SPENCER MORGAN AND CHARLES CUBITT GOOCH . . . . . } APPELLANTS;

AND

PIERRE ALFRED LARIVIÈRE . . . . RESPONDENT.

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Feb. 8, 11.

Opening a Credit—Contract—Equitable Assignment or Appropriation of a Fund—Trust—Foreign Sovereign—Chancery.

If a trust fund is in the Court of Chancery, that Court may proceed to administer it, even although a foreign sovereign may be interested in it, and may not think fit to come before the Court in a suit relating to it.

A writing opening a credit for a particular sum cannot, of itself, constitute an equitable assignment or specific appropriation of that sum so as to create a trust. It is a mere statement that the person writing it will act as pay-master to the person to whom it is written, up to a certain amount, on his performing the conditions set forth in it.

L. entered into a contract (dated the 30th of November, 1870) with the French Minister of War, represented by *J.*, his delegate at *London*, to supply 20,000,000 of ball-cartridges of a certain quality, the whole to be supplied by the 10th of January, 1871. Time was to be considered of the essence of the contract. *L.* desired some arrangements to be made as to payment. *M. & Co.*, who acted in *London* as financial agents for the French Government, wrote to *L.* a letter dated the 1st of December, 1870, in these terms:—"We are instructed by *J.* to advise you that a special credit for the sum of £40,000 has been opened with us in your favour, and that it will be paid to you rateably as the goods are delivered, upon receipt of certificate of reception issued by the French Ambassador or by *J.*" The goods were not delivered according to the contract:—

Held, that this letter did not constitute Messrs. *M. & Co.* trustees for *L.* as to the sum named, nor constitute an equitable assignment as of a fund in their hands, and that consequently this was not a matter for the exercise of the jurisdiction of the Court of Chancery.

THIS was an appeal against a decision of Lord Chancellor *Hatherley*, by which a previous decision of Vice-Chancellor *Malins* had been affirmed with a variation. The facts of the case are set forth in detail in the report of the hearing in the Court below (1). The following is a summary of them:—

In 1870 the Committee for the National Defence in *France* authorized the making of a contract for ball-cartridges for the French Army. This contract, dated on the 30th of November,

(1) *Nom. Larivière* v. *Morgan*, Law Rep. 7 Ch. App. 550.

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1870, was for the supply of 20,000,000 of ball-cartridges, and was entered into with *Larivière* and his then partner *Bellot des Minières.* These gentlemen were described in the contract as residing in *London.* The French "Minister of War, represented by M. *Joulin,* his delegate in *London,*" on the 10th of November, 1870, entered into the contract here. The contract contained several articles, of which the following are alone material now to be considered:—4th. "Out of the 20,000,000 cartridges to be supplied, 7,000,000 must be delivered before the 5th of December, and the remainder before the 10th of January, 1871; and time will be considered of the essence of the contract." 5th. "The cartridges will be tried in *London* by a French delegate charged with this office [duty], who will deliver a certificate stating that the cartridges are sufficient for war service, and serviceable for the rifles of the model of 1866." 7th. "The lots will, immediately after having been duly accepted, on the responsibility of the delegate of the Minister of War in *London,* be paid for through the care of the French Ambassador, who will issue cheques for the amount." 8th. "The contractors cannot claim acceptance of any of the merchandise after the 10th of January, 1871, and cannot claim any indemnity for goods supplied after the hereinbefore stipulated time."

The contractors had asked for the deposit of a sum of money with some *London* bankers. No actual deposit of money appeared to have been made, but Messrs. *Morgan & Gooch,* who acted as financial agents for the French Government, under the direction of M. *Joulin,* wrote, on the "1st of December, 1870," the following letter to *Larivière & Des Minières*:—"Gentlemen, we are instructed by M. *Joulin* to advise you that a special credit of £40,000, equivalent to one million of francs, has been opened with us in your favour, and that it will be paid to you rateably, as the goods are delivered, upon receipt of certificates of reception [acceptance], issued by the French Ambassador or by M. *Joulin.* We shall require receipts in duplicate for the payment or payments as made, and the surrender of this letter on the final payment under it being made."

The whole interest in the contract subsequently vested in *Larivière.* He supplied, and the French Government accepted

and by cheque on *Morgan & Gooch* paid for, 70,000 ball-cartridges. Alterations in the form and manufacture of the cartridges were afterwards proposed, and experiments were tried, some of them under the supervision of M. *Joulin*, which experiments *Larivière* alleged in his bill prevented him from complying with the stipulation in the articles as to the delivery of the cartridges within the time therein fixed. On the 13th of January, 1871, *Morgan & Gooch* wrote to *Larivière* to say: "M. *Joulin* now informs us that as the time has already expired within which the deliveries of goods were to be made, and to pay for which this credit was opened, no farther deliveries can be made under it, and we are not to make any farther payment in virtue of it. Under these circumstances, in accordance with the instructions, we request you will return us our letter dated the 1st ultimo, and take note that the credit advised therein is withdrawn and cancelled." Some cases of cartridges had been furnished after the 10th of January, but certificates of acceptance of them had been refused.

Larivière filed his bill against *Morgan & Gooch* and the nine persons who, in November 1870, had formed the Committee for the National Defence, but the bill was afterwards amended by striking out these latter individuals and making the Government of the French Republic a Defendant. *Morgan & Gooch* put in an answer, but the Government of the French Republic declined in any way to appear in the cause.

The bill prayed that *Morgan & Gooch* might be declared to hold the residue of the £40,000 upon trust for the Plaintiff, and for inquiries, and for an injunction to restrain them from parting with this residue of the £40,000. The Defendants denied that they had done more than merely open a credit for sums to be paid as the French Government might order. They opened such credits from time to time under orders, and carried back to the general account any balance from any particular credit so opened.

The cause was heard before Vice-Chancellor *Malins*, who (after having given the French Government the opportunity to appear in the suit, an opportunity of which it did not avail itself) made an order that the Defendants *Morgan & Gooch* should bring into Court the residue of the sum of £40,000, and a declaration that the condition as to time being of the essence of the contract

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had been waived, and therefore he directed an inquiry as to what, if anything, was due to the Plaintiff on the footing of the agreement. On appeal to Lord Chancellor *Hatherley*, it was declared that by virtue of the contract of November, 1870, and the letter of the 1st of December, 1870, the Plaintiff became entitled to be paid rateably for all cartridges supplied to and received by the French Government under the contract out of the sum of £40,000; and that the first limit of time fixed by the contract, the 5th of December, 1870, by which 7,000,000 of cartridges were to be delivered, was waived. And inquiries were directed whether the second limit of time had been waived; what number of cartridges had been delivered, or tendered and accepted, and what rejected; and the balance of the £40,000 paid into Court was ordered to be retained.

This was an appeal against that order.

Mr. *J. Pearson*, Q.C., and Mr. *Fry*, Q.C. (Mr. *Jason Smith* was with them), for the Appellants:—

There was not a pretence, either in the facts of the case, or in the rules of equity, which ought to govern it, for the filing of this bill. The letter relied on by the Plaintiff did not constitute a trust, yet it had been presented to the Court as a trust, and the fund spoken of in that letter was described in the Court below as "impressed with a trust." That was the foundation of the error of which the Appellants had to complain. The letter was in no way whatever a trust, it was a mere announcement that certain persons had opened a credit at the house of the Appellants in favour of the Respondent. But in what way was it to be in his favour? not in an absolute form, not in the way of a right vested in despite of all contingencies, but in the form of a title for him to demand certain moneys upon and after his performance of certain conditions. He could not demand the whole sum at once, he could only ask for such portions of it as would from time to time satisfy the value of the goods which, from time to time, he had delivered. And the delivery of goods was not the only restrictive condition on his right to claim the money; the goods must not only be delivered by him, and delivered within a fixed time, but were to be accepted and received, the fitness of the goods having

been ascertained and then certified, and the acceptance of them after this certification was to be acknowledged. When all these things had been done, then, and then only, the Appellants undertook to pay the Respondent sums of money sufficient to meet the value of the goods which had been offered for acceptance, certified as being fit for acceptance, and declared to have been actually accepted. There was a farther condition, the goods were to be delivered within certain specified periods, and the time of delivery was declared in the articles of the contract to be of the essence of the contract. No one of these conditions had been complied with by the Respondent. And part only of the goods had been delivered, that part had been accepted and had been paid for. No claim could be made by him in respect of any other goods against the Appellants.

There was no equitable assignment of a specific fund here. The Appellants had not received any fund specially appropriated to the use of the Respondent; no such fund existed in their hands, in respect of which they had put themselves in the position of trustees to the Respondent bound to pay out the fund to him as to a person who had a vested right in it. There was nothing like an equitable assignment of it: *Citizens Bank of Louisiana* v. *First National Bank of New Orleans* (1); and the Respondents were, therefore, not liable to account to him for it. They had no fund in hand; they had never pretended to have a fund in hand; they had merely consented to make payments from time to time upon the performance, by the proposed payee, of certain conditions. If he did not perform the conditions he had no right to claim the payments. If the Appellants had, under such circumstances, made payments, they would have done so in their own wrong. The claim really was one for liquidated damages on a contract, and the proceeding taken here was wholly misconceived.

Again, the form of the decree was wrong, for it affected to be a decree which was in substance to affect the property of a foreign sovereign state which had in no way submitted to the jurisdiction of the Court. The Appellants were not that sovereign state, and no decree against them could make them responsible for it.

(1) Law Rep. 6 H. L. 352.

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Upon the question of jurisdiction, *Stevenson* v. *Anderson* (1), and *Duke of Brunswick* v. *King of Hanover* (2), were referred to.

Mr. *Glasse*, Q.C., and Mr. *Davey*, for the Respondent:—

The letter of the 1st of December, 1870, written by the Appellants to the Respondent, must be taken as an appropriation of a specific sum of money. The money must have been in the hands of the Appellants, who were the financial agents of the French Government; but whether that was the fact or not was really immaterial. They had stated the amount which they bound themselves to pay. This letter was written after the Respondent had agreed to supply the goods, and was in fact a declaration that the Appellants had the money to meet his demands for his goods, and that it would be paid to him on that account. It is called a special credit, but what is a special credit except a declaration that there is in the hands of these persons a certain sum of money devoted to a particular purpose. So far as the Respondent could comply with that purpose, he has complied with it; and the only failure was as to time, and that was the consequence of the acts of the agents of the French Government. [References were made to the evidence to support this statement.] So that even if the money was only to be paid upon the performance of certain conditions, the non-performance of them could not affect the Respondent, for their performance had been prevented by the acts of the French Government, or of the accredited agents of that Government, and the title of the Respondent to receive payment was unaffected. If time was of the essence of the contract the French Government had completely waived the stipulation. The Appellants could not shelter themselves from the duty they had undertaken by referring to the delay which the French agents had themselves occasioned. The declaration that they had opened a credit in favour of the Respondent was a declaration that they had control over a fund of a certain specified amount appropriated to a certain specified purpose. Surely that is the declaration of a trust as to that specified fund, and shews that the fund itself was impressed with a trust. The Appellants could not afterwards deny

(1) 2 V. & B. 407. (2) 2 H. L. C. 1.

what they had thus written, and free themselves from liability on the supposed delay in the performance by the Respondent of what he had undertaken. If such a matter was set up as an answer to his claim it was a proper subject for an inquiry, and the inquiry here had been rightly directed.

This was not a suit against a foreign government, and, therefore, the objection to the jurisdiction did not arise. The Appellants had constituted themselves by their own letter the agents and representatives of the foreign government, and had made themselves trustees of a fund which their own letter shewed was held by them for the benefit of the Respondent. If they made themselves liable to parties in this country, for acts to be done in this country, they could not turn round and say that the persons for whom they acted, and for whose purposes they had consented to become trustees of a fund in this country, were foreigners, and were not disposed to allow them to part with that fund. Their letter acknowledged the existence of that fund, charged themselves with being the holders of it for the benefit of the persons to whom that letter was written, and bound themselves to pay it over to those persons.

It might be that a foreign sovereign could not be compelled to submit to the jurisdiction of our Courts, but that would not affect the duties and liabilities of those who had thought fit, for purposes of their own, or purposes of that foreign sovereign, to put themselves in his place, and who were acting for him, although actually native-born subjects of this country.

Mr. *Pearson* replied.

THE LORD CHANCELLOR (Lord *Cairns*):—

My Lords, this case was heard at your Lordships' Bar a few days since, at which time we had the advantage of the presence and assistance of my noble and learned friend Lord *O'Hagan*, who is prevented by indisposition from being present to-day.

My Lords, the question arises with regard to the proper construction to be placed upon a letter written on the 1st of December, 1870, from the present Appellants to the Respondent, or those whom the Respondent now represents. The decrees of the

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Court of Chancery, which are brought before your Lordships by way of appeal, proceed upon the footing that that letter constituted, in favour of the Respondent, either an equitable assignment or a trust of a particular sum of money in the hands of the Appellants, and the Court proceeds to give directions for the administration of that sum as a trust fund.

My Lords, if that view of the letter to which I have referred was well founded, it would no doubt avoid the necessity of considering the position of the Government of *France*, which was said to be interested in the subject of the suit, but which did not, although the opportunity was given, think fit to appear in the Court of Chancery. No doubt, under such circumstances, the Court, having a trust fund under its control, might well proceed to administer that fund, even although a foreign government might be interested in it, and might not be before the Court, or subject to the jurisdiction of the Court. But, my Lords, the first question to be determined is this: Was the view of the Court of Chancery, in treating this as in the nature of a trust, or of an equitable assignment, correct?

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The only facts which need be adverted to are these:—During the late war between *France* and *Germany*, a contract was made, between the then Provisional Government of *France* and *Larivière* and *Des Minières*, for the supply to the French of ball-cartridges. The date of that contract, or the date of its approval, is the 30th of November, 1870, and by the contract it is provided that the two contractors engage themselves to supply the French Government with 20,000,000 of ball-cartridges for rifles, according to a certain model, at a certain rate per thousand. The delivery was to take place in *London*. Out of the 20,000,000 of cartridges 7,000,000 were to be delivered before the 5th of December, 1870, and the remainder before the 10th of January, 1871, and time was to be considered as of the essence of the contract. Then the cartridges were to be "tried in *London* by a French delegate," that is to say, a delegate of the Provisional Government, "charged with this office," who was to "deliver a certificate stating that the cartridges were efficient for war service, and serviceable for the rifles of the model 1866." "The lots will immediately, after having been duly accepted on the responsibility of

the delegate of the Minister of War in *London*, be paid for through the care of the French Ambassador, who will issue cheques for the amount." That contract was, as I have said, approved of at *Tours*, then the seat of the French Government, on the 30th of November, 1870, and it was signed on behalf of the Minister of War, or by his order, by a M. *Joulin*, who describes himself as "the delegate," that is, the delegate of the Minister of War. That was the contract between the French Government and *Larivière* and his colleague.

The present Appellants, Messrs. *Morgan & Co.*, are bankers and financial agents in *London*. About this time they appear to have been engaged in raising a loan amounting to a very large sum of money for the French Government in the English market, and they had financial dealings on behalf of the French Government. And, my Lords, it appears that, for reasons which are sufficiently obvious, Messrs. *Larivière* and *Des Minières*, wishing to have some person to whom they could look in this country, for the purpose of satisfying the payments to be made under this contract, were anxious to have some information or assurance from Messrs. *Morgan & Co.* that payments would be made to them as they were due. It is, I think, obviously in answer to a wish of that kind that the letter which I am about to read to your Lordships of the 1st of December, 1870, was written.

My Lords, I said at the outset that it appeared to me to be, after all, a mere question of the construction of this letter; for I think your Lordships will be of opinion that there is no evidence whatever, to which we can attach any weight, of anything passing, by way of conversation or otherwise, between any of the parties, altering in any way what may appear to your Lordships to be the true construction of this letter. The letter is written in *London*, and addressed to Messrs. *Bellot des Minières & Larivière*, and it is signed "*J. S. Morgan & Co.*" It runs thus:—"Gentlemen, we are instructed by Mr. *L. Joulin*" (M. *Joulin*, as your Lordships will remember, was the delegate of the Minister of War), "to advise you that a special credit for the sum of £40,000"—equivalent to one million francs—"has been opened with us in your favour, and that it will be paid to you rateably as the goods are delivered upon receipt of certificates of reception issued by the French

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Ambassador or by M. *L. Joulin*. We shall require receipts in duplicate for the payment or payments as made, and the surrender of this letter on the final payment under it being made." My Lords, I may pause for the purpose of observing that the word "rateably," which occurs in that contract, is obviously intended to have this meaning: the documents which were to be presented to Messrs. *Morgan & Co.* were certificates of the reception of a certain number of cartridges, but apparently were not to contain any mention of the price or of the sum to be paid; and I understand the term "rateably" to mean that payments would be made upon those certificates of reception, which would merely mention quantity, by reference to the contract, which would represent prices, so that a rateable proportion of the whole purchase-money under the contract would be paid according to the quantities stated in the certificates of reception.

But now, my Lords, arises the question: What is there in this letter which constitutes an equitable assignment, or what is there in it which impresses with a trust any particular sum of money? I can find no expression in this letter which could authorize such a conclusion It appears to me to be simply a statement by a banker that he has opened a credit under instructions in favour of a particular person. That is an expression well known to bankers, and well known to all persons engaged in commerce. It is simply an undertaking by the person who conveys that intimation that he will give credit, that he will pay, that he will allow himself to be made a person upon whom demands or drafts may be made for payment. Your Lordships are perfectly familiar with this, which occurs every day in commerce: a credit is opened with a particular house of business in favour of another house of business; generally a credit of that kind is, to use a mercantile phrase, "operated upon" by bills of exchange being drawn upon the house which undertakes to give the credit; but a credit of that kind may be operated upon also by means of cheques, or it may be operated upon by simple demands, in any form, for the payment of the sum for which credit has been undertaken to be given.

My Lords, I read this letter as being nothing more than this: a statement by bankers to a tradesman who supplies goods to a customer of the bankers that they, the bankers, on behalf of their

customer, will act as paymasters to the tradesman up to a certain amount of money; but that, in order to call upon them to act as paymasters, he, the tradesman, must bring with him a certain certificate shewing that the goods have been delivered to their customer. In a transaction of that kind there is nothing of equitable assignment, there is nothing of trust; and it appears to me that any banker who had given an undertaking of that kind would be very much surprised to find that it was held that a certain portion of the funds of his customer in his hands had been impressed with a trust, had been equitably assigned, and had, in fact, ceased to be the moneys of the customer, and had become the moneys of the tradesman who was to supply the goods.

Now, my Lords, that is the whole of this case. I regret that, in the Court of Chancery, a great deal of very ingenious argument was spent upon the question of the amenability of a foreign government to the jurisdiction of our Courts, and upon the farther question, whether, in the case of this particular contract, the dates which had been stipulated for as of the essence of the contract had, in point of fact, been waived. My Lords, it appears to me that these questions do not in any way arise unless there is first some foundation for the jurisdiction of the Court of Chancery. If this is, as it appears to me to be, merely a personal undertaking by bankers to make a payment, there is no room whatever for the jurisdiction of the Court of Chancery. It is a money demand; if it exists at all, it exists as a personal demand against Messrs. *Morgan & Co.*; and in a case of this kind, where there is no suggestion whatever of any incapacity on the part of Messrs. *Morgan* to meet any personal demand brought against them, it is only too obvious that these proceedings are simply an attempt to change the jurisdiction, and to bring that which ought to be the subject of demand, if at all, in an action at law, into the Court of Chancery, in order, by treating the case as a case for the administration of a trust, to get rid in some way of the stringency of the terms of the contract as to time.

My Lords, it appears to me that the case as one for the jurisdiction of the Court of Chancery entirely fails, and that the decree which ought to have been made by the Vice-Chancellor before whom it first came should have been a decree dismissing

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the bill with costs. I shall accordingly move your Lordships that the decrees complained of be reversed, and that the bill be dismissed with costs.

My Lords, I ought to add that my noble and learned friend Lord *O'Hagan* has informed me that, having considered the case, he concurs in the view which I have endeavoured to express to your Lordships.

LORD CHELMSFORD :—

My Lords, the question of the liability of the Appellants depends entirely upon the effect of their letter of the 1st of December, 1870, written to the Respondent the day after the date of his contract for the supply of 20,000,000 of ball-cartridges to the French Government.

It was argued on the part of the Respondent that the letter amounted to an equitable assignment or specific appropriation of the sum of £40,000, or that the Appellants thereby constituted themselves trustees of that sum for the Respondent. But opening a credit for a particular sum cannot constitute an equitable assignment or specific appropriation of that sum, but is merely an authority to the person in whose favour the credit is opened to draw to the extent of the specified amount. Nor, in my opinion, can the letter of the Appellants informing the Respondent that the credit had been opened (no sum being set apart or appropriated as a specific fund to be drawn upon) constitute them trustees of the amount for which the Respondent is to be at liberty to draw. Even if it can be said to amount to a trust, is it one which a Court of Equity would enforce, being purely voluntary and without any consideration? The money in the hands of the Appellants belonged to the French Government, who might, for anything that appears, have withdrawn the whole of it. Suppose the Government had done so, and the agents had continued to accept and give certificates for cartridges manufactured by the Respondent, could the Appellants be compelled to pay for them although deprived of all the funds by reason of the possession of which they opened the credit? If there had been a trust impressed upon an appropriated sum of £40,000, they would have been bound to do so, although they could not have resisted the demand of the French

Government for the restoration of the whole of the moneys. Suppose all the funds had thus been withdrawn, and the French Ambassador had afterwards improperly given cheques upon the Appellants for cartridges delivered and accepted, would a Court of Equity have said the £40,000 was impressed with a trust, and it was a breach of that trust to part with it, and therefore the Appellants must pay the contractor, who is armed with all that is necessary to establish his right to payment, and looks for indemnity to the French Government?

By the contract, the payments for the cartridges are to be made by cheques drawn not by the Respondent but by the French Ambassador, and by the Appellant's letter payment is to be made upon receipt of certificates issued by the French Ambassador or M. *Joulin*. Suppose the certificates withheld, or the cheques not drawn, without any good reason for their not being drawn, could the Court have been justified in ordering payment by the Appellants, such payment not being sanctioned in the manner prescribed by the proper authorized agent of the French Government?

It was suggested in argument, that if proper certificates of reception of cartridges had been received, and (it should have been added) cheques had been drawn by the Ambassador, and the Appellants had refused to pay, an action might have been maintained. But I entertain great doubt whether there would have been held to be a sufficient consideration to support a promise at law, even if the letter amounted to a promise, which is by no means clear to my mind. However, it is sufficient to say that the letter on which the question depends created no trust, and therefore the decree cannot be supported.

But although this disposes of the question I must not altogether omit the question as to the waiver of the time within which the contract was to be performed. One can well understand how important it was to the French Government that every dispatch should be used in the delivery of the cartridges to be supplied by the Respondent; and therefore it was stipulated that time should be considered of the essence of the contract. Now the Respondent did not in any instance adhere to the limit of time. Instead of delivering 7,000,000 of cartridges before the 5th of December,

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he delivered only 870,000 on the 24th of December. But the time for delivering and also the quantity to be delivered at this first period were waived, the cartridges having been accepted, and the sum of £5313 3*s.* paid for them. Of course, the waiver of the time in this instance did not set the Respondent free from the necessity of observing the limit of time fixed for the delivery of the undelivered quantity of cartridges.

But the Respondent alleges that time was also waived as to the performance of the remainder of the contract. The Respondent states that Messrs. *Joulin* and *Boulanger*, agents of the French Government to superintend the manufacture of the cartridges, suggested alterations in the form of the cartridges which necessitated a change in the tools and machinery employed, thereby causing considerable delay in the work, so that he was prevented from delivering the residue of the cartridges on the 10th of January, 1871, which he says he would otherwise have been able and was prepared to do, and that he applied to the agent of the committee (not naming him) to extend the time, which the agent verbally agreed to do. The Respondent also states that on the 10th of January the accredited agent of the committee approved and accepted 300 cases of cartridges, and by a letter to Captain *Bourdreaux*, who was charged with the duty of granting the proper certificates, advised him of his acceptance thereof, and that afterwards farther parcels of cartridges were approved of and accepted by another agent.

The time, therefore, is said to have been enlarged verbally by an agent of the French Government. But the agent, whose employment was only to see that the cartridges were manufactured according to the contract, could have no authority to enlarge the time, which it is expressly stipulated shall be of the essence of the contract. And with respect to the cartridges said to have been supplied and accepted on the 10th of January, and afterwards, but for which no certificates were granted, how can the Appellants be liable for them? Even supposing that Captain *Bourdreaux* improperly refused to grant certificates, what have the Appellants to do with that? Their engagement is to pay, not upon the mere approval and acceptance of the cartridges, but

upon receipt of certificates of reception issued by the French Ambassador or by M. *Joulin*.

Nor was the withholding of the certificates an unjustifiable act, as it was evident that the Respondent was wholly incapable of performing his contract within the stipulated time. Instead of the first delivery of 7,000,000 of cartridges by the 5th of December, he had been able to manufacture and deliver no more than 870,000 on the 24th of December. It was clear, therefore, that between that day and the 10th of January it was not possible for him to have prepared the remaining quantity, being upwards of 19,000,000. If every other question, therefore, had been determined in the Respondent's favour, how could he possibly claim from the Appellants any farther sum than that which he has received from them, not being able to produce to them the requisite evidence that they were entitled to make him any payment upon the terms of their letter?

I agree, therefore, my Lords, with my noble and learned friend that the decrees ought to be reversed.

Decrees appealed against reversed; and bill dismissed with costs.

Lords' Journals, 11th February, 1875.

Solicitors for the Appellants: *G. M. Clements*, for *Bonham, Dalrymple, Drake, & Co.*

Solicitors for the Respondent: *G. R. Innes & Son.*

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Feb. 15, 16.

DOROTHEA YATES . . . . . Appellant;

and

UNIVERSITY COLLEGE, LONDON, and C. T. D'EYNCOURT . . . . . Respondents.

Will—Bequest—Condition—Performance—Vesting—Practice.

The expression of an intention accompanying a bequest does not, necessarily, constitute a condition on which the bequest is to take effect, or be defeated. The testator may not do that which would fully effectuate his expressed intention, and yet the bequest may be valid.

A testator left certain specified personalty to his wife for life, and after her death provided as follows, "I give and bequeath the same, &c. unto *University College, London*, for the purpose of founding in it a new professorship in Archæology, for the regulation of which professorship I purpose preparing a code of rules and regulations, which I intend to authenticate under my hand." As soon as convenient after his decease, the fact of his bequest and a copy of the rules were to be communicated to the college, and the college was, within twelve months afterwards, to signify in writing by the president, &c., the acceptance of the said rules; and if the college should decline or refuse to accept the rules, or should not within twelve months signify acceptance thereof, the bequest of the stock and shares was to be wholly null and void, and the stock and shares were to sink into and form part of the residuary estate. The testator died without making any rules:—

Held, that the will contained a clear and valid bequest, which was not affected by the subsequent provisions, nor by the non-acceptance of intended rules and regulations, the acceptance of which had, by the act of the testator himself, been rendered impossible.

The House will not, on the application of a person not an Appellant against a decree, make an alteration in it. If a change in the details of the decree should be necessary, his application for it should be made in the Court below.

THIS was an appeal against a decision of Lord Chancellor *Selborne* and Lord Justice *Mellish*, by which a previous decree of Vice-Chancellor *Bacon* had been reversed (1).

James Yates (the husband of the Appellant), by his will, dated the 24th of February, 1864, gave a sum of £3980 consolidated stock of the *North Western Railway Company*, and all the stock he might possess in that company at the time of his death, to his wife for life, subject to payment by her of £25 to Mr. *Morris*, the professor of Mineralogy and Geology at *University College, London*,

(1) Law Rep. 8 Ch. Ap. 454.

during their joint lives, "And after the decease of my said wife, I give the said stock, shares, &c., to *University College, London,* upon trust to pay the annual income thereof to the professor of Mineralogy and Geology for the time being of that college, as an endowment of the said professorship." He then gave several other railway and other stocks to his wife for life, and after her death he gave the same and the dividends, &c., "unto the said *University College, London,* for the purpose of founding in it a new professorship of Archæology, for the regulation of which professorship I purpose preparing a code of rules and regulations, which I intend to authenticate under my hand. And I hereby expressly declare my mind and will to be that, as soon as conveniently may be after my decease, my executors shall communicate to the said *University College* the fact of my said last-mentioned bequest to the said college, and a copy of the said rules and regulations; and the said *University College* shall, within twelve calendar months next after the fact of the said bequest shall have been so communicated by my said executors as aforesaid, signify by writing under the hand of their president, treasurer, or secretary, their acceptance of the said rules for the future regulation of the said professorship. And I farther declare that if the said *University College* shall decline or refuse to accept the said rules for the regulation of the said professorship, or shall not within the space of twelve calendar months signify to my executors in manner aforesaid their acceptance of the same, then I declare that the said bequest of the said stock, &c., and every other legacy and bequest herein, or in any codicil hereto, contained, in favour of the said *University College,* shall be wholly null and void, and the said stock and shares and all other benefits, hereby, or by any codicil hereto, by me intended for the said *University College* shall sink into and form part of my residuary estate." He then, "but subject to the conditions aforesaid," gave all his books on mineralogy and geology, and his mineralogical and geological specimens, &c., to the college, and went on thus: "And I also give to my great nephew *Henry Yates Thompson,* if living at my death, but if he be not then living, then to such person as, if there be no females living at my decease, would be my heir-at-law, my share in the same college, with the intent that the same share shall always be held and enjoyed by

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my heir-at-law for the time being, so that he may have means of knowing whether my various bequests in favour of the college and the two aforesaid professorships, are applied and maintained as I have endeavoured to prescribe and appoint." He directed that the legacies given by him to any public institution should be paid out of his "personal estate, and not out of his real or leasehold estate." No deduction was to be made for legacy duty, and he gave all his freehold and leasehold estate and all his moneys, stocks, and shares not otherwise disposed of, for the absolute use of his wife and her heirs and assigns; and he appointed his wife, Mr. *Crompton*, and Mr. *D'Eyncourt* executors of his will.

The testator died on the 7th of May, 1871, without having revoked or altered his will, which was duly proved by his widow and Mr. *D'Eyncourt;* Mr. *Crompton* renounced.

The testator never framed any rules and regulations for the professorship, and his widow claimed the shares and stocks, &c., insisting that, under the circumstances, the gift of them to the college had become wholly void; but she declared her readiness to pay the £25 a year to Mr. *Morris* during their joint lives. On the 21st of December, 1871, she filed her bill against the *University College, London*, and against Mr. *D'Eyncourt*, praying for a declaration that she was absolutely entitled to the funds in question. The Respondents put in their answers to the bill, and the motion for a decree came on for hearing before Vice-Chancellor *Bacon*, on the 2nd of December, 1872, when His Honour made a decree declaring that, in the events which had happened, the bequest in favour of the *University College* was wholly null and void, and the shares, &c., formed part of the residuary estate of the testator. On appeal, the Lord Chancellor (Lord *Selborne*) and Lord Justice *Mellish* reversed this order, declaring that the gifts in favour of the *University College* were valid. This appeal was then brought.

Mr. *E. E. Kay*, Q.C., and Mr. *Forbes Hallett*, for the Appellant:—

The Vice-Chancellor rightly treated the words relating to the preparation and acceptance of the rules and regulations as constituting a condition which must be strictly performed. If the performance of that condition failed, all failed. There are many

other legacies in the will; to no one of them is any condition attached. Here a condition was attached: it was a condition precedent; it was one which entirely depended on the testator's voluntary act; he imposed the condition and he has shewn by his subsequent conduct that he intended the performance of that condition to be rendered impossible. The gift therefore failed. In fact, he did not, upon reflection, intend that his original idea of a gift to the college to found a professorship should ever take effect. He changed his mind, and rendered his gift impossible. He did not in form recall the bequest in his will; he believed that to be unnecessary; he thought that, if he did not make the regulations, the making and acceptance of which constituted a real condition precedent to the foundation of the professorship, the bequest he had at first made would necessarily become void. He simply abstained from doing that which he thought was necessary to give effect to the bequest, and he believed the bequest to be at an end. He had, in fact, shadowed forth such a result when he expressly declared that if the regulations he intended to make were not accepted, and accepted too within a given time, and accepted by certain formal declarations, the amount of the bequest should sink into the residue. He believed the acceptance of his rules to be imperative and unavoidable, and he purposely rendered the acceptance of them impossible. He did not intend simply to found a professorship, but meant to found one of a particular kind, subject to such rules and regulations as he should impose. Its form and government were to be the subject of his creation: if not so formed and so governed, he did not mean that it should exist at all. In all probability he could not satisfy himself on these points, and so he abandoned altogether the idea of founding the professorship, believing that it could never come into existence without his code of rules and regulations was first accepted. This is the plain construction of the will, and of his conduct in reference to it. Where a condition of this sort has been imposed it must be observed, and cannot be dispensed with even by an apparent assent of the donor: *Davis* v. *Angel* (1), where there was a gift to *J. D.* in case he should marry the testator's niece *E. G.* *J. D.* married, during the testator's lifetime and with the testator's assent, another lady, and

(1) 31 Beav. 223. On appeal 4 De G. F. & J. 524.

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it was held by the Master of the Rolls first, and afterwards on appeal by Lord Chancellor *Westbury*, that the condition being precedent could not be removed by the assent; and His Lordship said: "What we are dealing with is a bequest contained in a will dependent for its existence upon the happening of a particular event, and the argument is, that the testator, by some conduct or act subsequent to the making of the will, has in effect struck that condition out of the will, and made the bequest, which is a conditional one, absolute. I do not think that it would be possible, in the present state of the law, to contend that any act of the testator, independently of writing—independently of a testamentary act—could have that effect." The same principle had been long before acted on in *Lloyd* v. *Branton* (1); and in *Burgess* v. *Robinson* (2) and *In re Hodge's Legacy* (3) a similar rule was enforced, though in each of the two earlier cases non-compliance with the condition had arisen from the complete ignorance of the legatee that the gift to him was the subject of any condition whatever. *Hervey* v. *Aston* (4) is a strong authority to the same effect, and all the stronger because the condition there was in restraint of marriage. Though the first words of the gift here appear to amount to an absolute bequest, they must not be separated from the other words in the will relating to that gift, for that would be to defeat the plain intention of the testator, which was to make himself the lawgiver of the professorship he proposed to found. When he spoke of the gift and of the rules and regulations being communicated to the college, he put the two things together; and it was plainly his idea that they were not to be separated, but that the acceptance or non-acceptance of both should be identical. He proposed to found a professorship of a perfectly new kind. Archæology was a new thing; the term itself was indefinite, and he intended to give this new professorship a form that should be entirely his own. He could not satisfy himself as to the mode of doing this, and so he abandoned altogether the idea which had at first attracted him. He did not intend that the fact of the bequest should be communicated until the rules should be communicated too, and

(1) 3 Mer. 108; see *Younge* v. *Furse*, 8 De G. M. & G. 756.
(2) 3 Mer. 7.
(3) Law Rep. 16 Eq. 92.
(4) 1 Atk. 361; Cas. t. Tal. 212, 317.

the acceptance of the gift he intended to be dependent on the acceptance of the rules. As he made no rules, there could be no communication of them; and he did not intend that there should be any communication of the bequest any more than of the rules. The performance of the conditions was sufficiently enforced by the direction that the bequest, if not accepted as he required, should fall into the residue, which was thus made fully effective as a formal gift over.

Mr. *Hinde Palmer*, Q.C., appeared for the executor.

Mr. *Fry*, Q.C., and Mr. *Cozens-Hardy*, for the college, were not called on.

THE LORD CHANCELLOR (Lord *Cairns*):—

My Lords, the question which has been raised by this appeal appears to me to admit of no doubt whatever, and I think it cannot fail to have struck your Lordships that in arguing the case at the Bar the learned counsel for the Appellant were driven to rest their case rather upon the effect of a gift over than upon a consideration of the meaning of the original bequest. Now, my Lords, I quite agree that if it could be found that in the original bequest there was something which required to be supplemented, so that you could not predicate of it that it was a complete bequest without the supplement, and if that supplement had not been applied or added, the bequest would have remained incomplete, and no legatee could have claimed under it. But on the other hand, if the original bequest is in itself complete, the only question which your Lordships have to inquire into is this—Is there anything in the subsequent part of the will which takes away that which originally was given?

My Lords, the original bequest was this: After leaving the property in question to his wife for life, the testator proceeds thus: "From and immediately after her decease, then I give and bequeath the same stock and shares, and the dividends, interest, and annual income thereof, unto the said *University College, London*, for the purpose of founding in it a new professorship of archæology." Now, stopping there, it appears to me beyond all doubt that this is a complete bequest. It is a complete bequest

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to the university upon trust, and the trust is sufficiently defined to be the foundation, establishment, and constitution of a professorship, which in the college was to be a new one; there had been none of the same kind before; it was called a professorship of archæology. No doubt archæology is a very large word. It may, as was well stated by the learned counsel who last addressed your Lordships, be limited in particular cases to the antiquities of particular nations only, or to those antiquities which range over a limited portion of time; but not being limited in any such way, it stands applicable to all the expanse which it, of itself, may cover. The word is a term of art perfectly well known. What it denotes is a science in itself; it has a perfect and complete meaning; and it not being limited here in any way, this professorship was to be a professorship of archæology in the largest sense of the term.

Now, my Lords, is there anything in the words which immediately follow making that original bequest, which appears from the words I have read to be complete, really incomplete? I can find nothing whatever which has that effect. The additional words are, "for the regulation of which professorship I purpose preparing a code of rules and regulations which I intend to authenticate under my hand." I read this as not imposing any infirmity or incompetency upon the bequest, but merely as a statement of the intention of the testator at the time the will was framed, that at some future period he proposed preparing a code of rules for the regulation of the professorship, which, if he did prepare them, would regulate the details necessary to be regulated with regard to the professorship; but which, if he did not prepare them, the framing of rules would naturally fall to the *University College*, in which the professorship was to be created. I can find nothing here in any way approaching to the nature of a condition, and consequently the argument with regard to cases founded upon conditional bequests, has no application whatever to this bequest in its original constitution.

But, my Lords, although you have a complete bequest in the first instance, no doubt there may afterwards be a condition, clear in its terms, and which, by reason of the events that have happened, must be read as part of the original bequest. What is said to be the condition which comes subsequently, and which, if it exists at all, must be a divesting condition? "I hereby expressly

declare my will and mind to be, that, as soon as conveniently may be after my decease, my executors shall communicate to the said *University College* the fact of my last-mentioned bequest to the said college and a copy of the said rules and regulations." What "rules and regulations"? Rules and regulations which at the time he made his will he was minded at some subsequent period to prepare. But if he did not prepare any such rules and regulations, how could his executors communicate them to the college? And if they were not communicated to the college, how could the fact of the non-communication of rules, which had no existence in any way, interfere with the bequest? He proceeds thus: "And the said *University College* shall, within twelve calendar months next, after the fact of the said bequest shall have been so communicated by my said executors as aforesaid, signify by writing, under the hand of their president, treasurer, or secretary, their acceptance of the said rules for the future regulation of the said professorship. And I farther declare that if the said *University College* shall decline or refuse to accept the same rules for the regulation of the said professorship, or shall not, within the said space of twelve calendar months, signify to my executors, in manner aforesaid, their acceptance of the same, then I declare that the said bequest of the said stock, shares, and debentures, and every other legacy and bequest herein, or in any codicil hereto contained, in favour of the said *University College*, shall be wholly null and void, and the said stock and shares, and all other benefits hereby, or by any codicil hereto, by me intended for the said *University College*, shall sink into and form part of my residuary estate."

Now, my Lords, it appears to me that the effect of that whole *catena* of directions depends upon the meaning which your Lordships give to the two words "said rules"; the whole hangs upon those two words. If "said rules" mean, as I think they clearly must mean, "rules to be prepared by me," and if those rules are not prepared by the testator, then there can be no refusal, no declining, no failure to accept that which has no existence. And then, going back to the original bequest, if the making of those rules is not of the essence of the original bequest, the whole of this claim of subsequent directions may be actually struck out of the will.

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My Lords, it was this view of the case which was taken by the Lord Chancellor and the Lord Justice in the Court of Appeal in Chancery. I venture to think that their order is entirely correct; and I submit to your Lordships that this appeal should be dismissed with costs.

LORD CHELMSFORD concurred.

LORD HATHERLEY:—

My Lords, I too entirely concur, and for the reasons stated by the Lord Chancellor.

The question wholly depends upon the construction of the will, and authorities are of no value in this case. There is a clear original gift, and the testator then indicates an intention which he has not performed. He does not express any condition, or anything that amounts to a condition. If the intention had been carried out, no doubt there might have been some ground, which there is not now, for contending that in the event of the rules not being accepted the property was to go over.

I may just call attention to one thing set forth in the Appendix to the printed case. There we find that certain shares are to go to his heir-at-law, and are always to be held by his "heir-at-law for the time being, so that he may have means of knowing whether my various bequests in favour of the college and the two aforesaid professorships are applied and maintained as I have endeavoured to prescribe and appoint." So that he clearly points to the thing as done in the will; he wishes the bequests to be applied for the professorships, and he wishes them to be maintained "as I *have* endeavoured to prescribe and appoint." I think it would be a very strange reading of the previous passage as to his then intention to frame rules, to say that you are to include in what he has "endeavoured to prescribe and appoint" the necessity of accepting certain rules which he has not made. It is quite clear that he thinks he has founded and endowed the professorships, as he had determined to found and endow them; he has given some books and other articles to the Professor of Mineralogy and Geology, and some other articles to the Professor of Archæology; he has prescribed and appointed certain things with reference to those

professorships, and he speaks of his bequests as a clear gift at all events, for he says: "Hereafter I have some notion of making other rules, and if I do make them and they are not accepted, then there is to be a gift over." The appeal must be dismissed.

Order appealed from affirmed, and appeal dismissed with costs.

Mr. *Hinde Palmer*:—Will your Lordships pardon me for a moment? I appear for the legal personal representative of the testator, and my instructions are that if this gift to the college prevails, as it will now, there will be an insufficiency of the general personal estate to pay the testator's debts and funeral and administration expenses. The consequence will be, as your Lordships will see in a moment, that all the specific legatees, including the college in whose favour your Lordships have just decided, will have to abate rateably and proportionately to make up that deficiency. In the decree made by the Lord Chancellor he simply declared that the college was entitled under the gift, and nothing more. Therefore, what I am going to suggest to your Lordships as something to be done now, is, that there should be what the bill prays for if necessary, namely, an account taken in the usual way to ascertain what this deficiency is, and then rateably to make it up out of the provisions for the specific legatees.

THE LORD CHANCELLOR:—My Lords, it is not your Lordships' habit to hear suggestions with regard to alterations of a decree made on the part of a person who is not himself an Appellant before your Lordships, and who does not challenge any part of the decree. It would be quite irregular upon a suggestion of that kind to make any alteration in a decree. If in the administration of the estate any change should be necessary, in consequence of what your Lordships have now done, it is in the Court of Chancery that the application should be made for that change.

Lords' Journals, 16th February, 1875.

Solicitor for the Appellant: *Hyde & Tandy.*

Solicitors for the Respondent: *Cookson, Wainewright, & Pennington.*

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Feb. 9, 16.

W. SCOTT FULTON, ISABELLA D. FULTON, AND MARGARET FULTON . . . } APPELLANTS;

AND

CHARLES BATTY ANDREW AND THOMAS WILSON . . . . . } RESPONDENTS.

Will—Execution—Residuary Clause—Verdict—New Trial—Judgment.

A will was propounded for probate. A caveat was entered. The Court of Probate directed the case to be tried at the assizes; it was so tried on six issues. The first four required a determination of the fact whether the testator was of sound mind and understanding, capable of making a will; the fifth, whether he knew and approved of the contents of the will; the sixth, whether he knew and approved of the residuary clause. That clause was the last in the will, and, by it, the propounders of the will were made the residuary legatees, and were appointed executors. Evidence having been taken, the Judge at the trial asked the opinion of the jurors on every one of the issues. They found for the propounders of the will on the first five issues, but for the opponents on the sixth. No leave to set aside the verdict and enter judgment for the propounders, notwithstanding the verdict on the sixth issue, was reserved, but when the case came before the Court of Probate a rule was obtained to set aside the verdict generally, and have a new trial, or to set aside the verdict on the sixth issue for misdirection. On argument, the Judge of the Court of Probate made the rule absolute to enter the verdict for the propounders of the will, and granted probate of the whole will, including the residuary clause:—

Held, that this judgment was irregular, and could not be sustained.

By the 40th Rule of Proceeding in the Probate Court (1865), made as to contentious business, it is required that any party having pleaded certain pleas as to the competency of the testator and the validity of the execution of the will, shall give particulars in writing, stating shortly the substance of the case he intends to present to the Court, and no other defence shall be available. The particulars delivered in this case set forth that, "at the time of the execution of the alleged will the deceased was in a state of mental prostration brought on by habitual drunkenness and disease of the brain, and that when he executed the alleged will he was not conscious of, and did not approve of, the contents of the alleged will or of the residuary clause":

Held, that these particulars could not be construed as restricting the Defendants to proof that the non-approval of the residuary clause was alone occasioned by mental prostration brought on by habitual drunkenness and disease of the brain.

Per LORD HATHERLEY:—Those who take a benefit under a will, and have

been instrumental in preparing or obtaining it, have thrown upon them the onus of shewing the righteousness of the transaction.

There is no unyielding rule of law (especially where the ingredient of fraud enters into the case) that, when it has been proved that a testator, competent in mind, has had a will read over to him, and has thereupon executed it, all farther inquiry is shut out.

THIS was an appeal against a decision of Lord *Penzance,* as Judge of the Probate Court, dealing with a verdict given on a trial which took place at ~~*Liverpool*~~ Appleby before Mr. Justice *Mellor.*

The question arose with respect to the will of one *Hugh Harrison.* The first-named Appellant was the father and guardian of the other two Appellants, all being legatees. The two Respondents claimed to be the residuary legatees under *Harrison's* will.

Hugh Harrison, of *George Street, Manchester,* the testator, made his will, dated the 11th of June, 1870. He was at that time resident at *Ivy House, Appleby,* in the county of *Westmoreland,* and was so described in the will. His will was (so far as is material to be referred to in this case) in these terms: "To my nieces *Isabella* and *Margaret,* the children of my late sister *Isabella Braithwaite Fulton,* each, the sum of £1000, for their separate use, when they shall respectively attain the age of twenty-one." There were then several individual legacies, among which were, "To my friend *Charles Batty Andrew* £1000," and, "To my friend *Thomas Wilson* £100." And the will went on, "I direct my Natural History collection, and the books on that subject, to be sold at the discretion of my executors hereinafter named." There were then again individual legacies, and the will went on, "All my freehold estate or farm at *Sandford,* in the parish of *Warcop, Westmoreland,* occupied by *John Fleming,* I devise to my nephew *William Fulton,* but in case he should die before attaining the age of twenty-one years, then I devise the same estate to my cousin *Anthony Harrison* and his heirs. All the residue of my real and personal estate I devise and bequeath equally to the said *Charles Batty Andrew* and *Thomas Wilson,* whom I appoint to be executors of this my last and only will." The will was signed "*Hugh Harrison,*" and the witnesses were, "*William Barnes,* Printer, *Appleby,*" and "*John Nanson,* Bank Agent, *Appleby.*"

The will being contested, it was, on the 18th of July, 1871,

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ordered by the Court of Probate that certain questions of fact should be tried at the Assizes for *Northumberland*. The executors, who were the persons propounding the will, were to be the Plaintiffs; the present Appellants were to be the Defendants in the trial.

The declaration in the Court of Probate set forth the execution of the will in the usual form. On the 2nd of June, 1871, the Defendants pleaded five pleas, which formed the substance of the first five issues finally settled for trial. Another plea was afterwards added by permission of the Court.

By rule 40*a* of the Rules and Orders in the Probate Court (1865) as to contentious business, it was declared that any party pleading certain pleas therein described shall therewith deliver to the adverse parties, and file in the Registry, "particulars" in writing, stating shortly the substance of the case he intends to set up thereunder, and "no defence shall be available thereunder which might have been raised under any other of the said pleas, unless such other pleas be pleaded therewith."

The "particulars" delivered in accordance with the above rule were in these terms: "That the deceased, at the time of the execution of the said alleged will, was in a state of mental prostration, brought on by habitual drunkenness and disease of the brain, and that he was not, in fact, when he executed the said alleged will conscious of, and did not approve of, the contents of the said alleged will, or of the residuary clause."

The Plaintiffs, by their replication, took issue on all the matters raised by the Defendants' pleas.

By an order dated the 18th of July, 1871, it was directed that the following questions of fact should be decided by the jury: "1. Whether the paper writing bearing date the 11th of June, 1870, and alleged to be the last will of *Hugh Harrison*, was executed according to the statute 1 Vict. c. 26? 2. Whether at the time the will bears date the deceased was of sound mind, memory and understanding? 3. Whether the execution of the will was obtained by the undue influence of *T. Wilson* and *C. B. Andrew?* 4. Whether the execution of the alleged will, in so far as it relates to the residuary clause, was procured by the influence of the said Plaintiffs? 5. Whether the deceased, at the time of the exe-

cution of the will, knew and approved of the contents of the will? 6. Whether the deceased, at the time of the execution of the said will, knew and approved of the contents of the residuary clause thereof?"

The cause came on for trial at *Appleby*, on the above issues, before Mr. Justice *Mellor* and a special jury. It was not contested that the will was duly signed in the presence of two witnesses, as required by the statute; the other points were contested.

It appeared in evidence that for some months the testator had resided at *Appleby*, paying little or no attention to his business, which was that of a silk merchant at *Manchester*. *Charles Batty Andrew* had acted as his manager in that business, and in May, 1870, had entered into negociations with him for the purchase of the business. With a view to these negociations, *Andrew* had gone to *Appleby*, and on the 28th of May an agreement, without any intervention of a solicitor to represent the testator, was drawn up between them. On the 30th of May *Wilson* went to visit the testator, at whose instance and on whose behalf was one of the questions of fact discussed in the cause.

It appeared that two sets of instructions had been given for the will, and they were put in evidence.

The instructions for the will given on the 30th of May, 1870, were sent by *Thomas Wilson* to his brother *William Wilson*, a solicitor, and were, so far as material in this case, in this form: "My freehold estate of *Sandford* to my nephew *Wm. Fulton* on his attaining twenty-one, and if he should die under that age, to go to my nearest heir, *Anthony Harrison*. To my two nieces, *Isabella* and *Margaret Fulton*, £1000 each (and rest of family portraits) when they attain twenty-one; to be invested in the meantime by the trustees. To *Hannah Turner*, £200 free of legacy duty. To *C. B. Andrew*, £1000. To *Tom Wilson*, £100 legacy. To *Charles Home Lloyd Fitzwilliam*, &c., the ancient portraits of the *Braithwaite* family, and one silver spoon with 'greyhound' thereon; and sea chest. Natural History collection (the whole) to be sold, and also the books on the subject. To *Sarah Richardson*, the 'Sermon on the Mount.' Miss *Fawcett* (*Warcop*), the Book of Psalms — 'Victoria Psalter.' Archdeacon *Boutflower*, the New Testament, with engravings. *C. B. Andrew* and *Thomas Wilson*

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executors and trustees for the children. Residue to executors. Mrs. *Harrison, Richmond*, £100."

The instructions for the will, dated the 9th of June, 1870, were (so far as material to this case), in these terms: "Freehold estate at *Sandford* to his nephew *Wm. Fulton*, but if he should die under that age, to his cousin *Anthony Harrison*." To his nieces *Isabella* and *Margaret*, £1000 each. "To friend *Charles Batty Andrew*, £1000. To friend *Thomas Wilson*, £100. To *Hannah Turner*, housekeeper, £200 net. . . . To friend *Sarah Richardson*, illuminated book, the 'Sermon on the Mount.' Miss *Fawcett* (*Warcop*) the Book of Psalms, or what is designated the 'Victoria Psalter.' Ven. Archdeacon *Boutflower*, the New Testament, with engravings. To children of my late sister *Isabella B. Fulton*, the rest of the family pictures. Residue to executors (and trustees for the children) the said *C. B. Andrew* and *Thomas Wilson*."

The will as executed was in the handwriting of *Thomas Wilson*. It was alleged by *Andrew* and *Wilson* that the will was read over to the testator, and left with him until the morning of the 11th of June. The will exhibiting the discrepancies already set forth between itself and the instructions, examination was directed to this subject, and it was admitted that the testator's attention was not, at the moment of its execution, drawn to these discrepancies. Witnesses were called to shew that, at the time of executing the will the testator was not in such a state of mind as to be competent to transact business or to understand the disposition of property he was then authenticating. Other witnesses however deposed, that though he was very weak in bodily health, he was quite of sufficient mental capacity to dispose of his property.

The jurors found the first and second issues in the affirmative, the third and fourth issues in the negative, and thus affirmed, so far, the validity of the will. As to the fifth issue, that the deceased knew and approved of the contents of the will at the time of the execution thereof. And, as to the 6th issue, that at the time of the execution of the said will he did not know and approve of the contents of the residuary clause thereof.

The learned Judge on these findings directed a verdict to be entered for the Plaintiffs (the present Respondents) on the first five issues, but for the Defendants (the Appellants) on the 6th issue.

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On the 30th of April, 1872, the Plaintiffs obtained a rule in the Court of Probate calling on the Defendants to shew cause why the verdict generally should not be set aside and a new trial granted, or why the verdict on the (sixth) issue whether the deceased knew and approved of the contents of the residuary clause in the will propounded, should not be set aside for misdirection.

The grounds of the alleged misdirection were, that the jurors ought to have been told that if they were satisfied that the testator was of sound mind and read the will, or had it read to him, and after that executed it, they were bound to find that he knew and approved of the contents thereof, and of the residuary clause; that the learned Judge had told them that they were to take into consideration the discrepancies between the instructions for the will and the will itself, and, having done so, to determine whether the testator had known and understood the residuary clause; but that the learned Judge ought to have told the jurors that in deciding upon the sixth issue they ought to consider simply whether the testator at the time of executing his will was unconscious of, and did not approve of, the residuary clause, owing to the mental prostration referred to in the particulars as intended to be set up under the fifth and sixth issues. The Plaintiffs also contended that the verdict on the sixth issue was against the weight of the evidence, and that the verdict on that issue ought to be set aside on the ground that the findings on the other issues really decided that one in favour of the Plaintiffs.

The Judge of the Probate Court, on the 18th of June, 1872, made the rule absolute to enter the verdict for the Plaintiffs, and pronounced for the force and validity of the will of *Hugh Harrison*, and of which probate was granted in August, 1870, and directed that probate should be given out to the Plaintiffs, the executors named in the will.

This was an appeal against that decision (1).

Mr. *Herschell*, Q.C., and Mr. *John Edwards*, Q.C., for the Appellants:—

The judgment here was not justified by the verdict. If the

(1) At the desire of their Lordships the notes of the trial, which were not set out in the printed cases, were furnished to them.

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Judge of the Probate Court was dissatisfied with that verdict, he ought to have directed a new trial; he had no power to enter a judgment in direct opposition to it. He had been asked for a new trial, but, instead of granting one, he gave a judgment in opposition to the verdict. He could not thus overrule and reverse the finding of a jury on a question of fact. The main issues were the fifth and sixth. The jurors found as to the fifth that the testator knew and approved the contents of the will generally. But on the sixth they found specially that he did not know and approve of the residuary clause. The former of these findings by no means included the latter; they were entirely distinct from each other. Yet the finding on the sixth issue has been overruled by the Judge of the Probate Court, who has granted probate of the whole will, including the residuary clause. This decision cannot be sustained. The particulars gave notice that the knowledge and approval of the residuary clause was to be a substantive matter of contest. That matter was decided by the jury in favour of the Appellants. The findings were sufficient to have prevented the grant of the probate as to that clause; for though when a will has been read over to a man who is competent to make a will, and he executes it, the general presumption is that it is his will, still, where there is a distinct question for a jury on a positive and definite issue, and there is a positive finding on that issue, and no new trial is granted, the judgment must be according to the finding. There was no necessity to grant probate of the whole will, or to refuse probate altogether. In *Allen* v. *McPherson* (1) it was held that probate might be granted as to one part of a will and might be refused as to another part. *Guardhouse* v. *Blackburn* (2), *Harter* v. *Harter* (3), *Williams* on Executors (4), *Barry* v. *Butlin* (5), and *Mitchell* v. *Thomas* (6), were also referred to and commented on.

The *Solicitor-General* (Sir *John Holker*, Q.C.), and Mr. *Fooks*, Q.C., for the Respondent:—

The evidence here fully warranted the Judge of the Probate

(1) 1 H. L. C. 191.
(2) Law Rep. 1 P. & M. 109.
(3) Law Rep. 3 P. & M. 11.
(4) Vol. i. p. 238.
(5) 2 Moo. P. C. 480.
(6) 6 Moo. P. C. 137.

Court in granting probate of the whole will, and he had a right to exercise his judgment upon that evidence. The particulars furnished under the rule of Court raised the question distinctly whether the testator at the time he executed the will was of sound mind, memory, and understanding. That question was expressly found in the affirmative. The next question was whether he was conscious of and approved the contents of the will. That again was found in the affirmative. These findings established the will. It was not competent after them for the Defendants to go into other questions. The particulars really restricted the case to the incompetency of the testator, brought on by habitual drunkenness and disease of the brain; and when it was distinctly found that he was not in that condition, but that he was of sound mind, memory, and understanding, there was an end of the case. Besides, there was an express finding of the testator's approval of the will, and there was no plea raising distinctly the question of his non-approval of the residuary clause on any other ground than that specially set forth in the particulars. This was a fatal objection to the finding on the sixth issue. The testator knew and approved of the contents of the will, and the finding that he did so included, of course, the residuary clause. There ought not to have been any question submitted to the jury on that clause alone; it was included in the general finding on the whole will. To make it a separate and distinct subject of inquiry, and upon any other ground than that of mental prostration, as described in the particulars, was a misdirection, and the finding itself upon it, coming after the finding on the fifth issue, was contradictory and insensible. It was therefore rightly disregarded in the Court below, and treated by that Court as a nullity. No one could doubt that the testator knew and approved of the executors, and their appointment and the gift of the residue formed but one sentence. He approved of the whole will, and did so after having it read over to him, and, after having had it in his custody for a night, he executed it. Having performed that undoubted act of approval, of the whole, it could not be allowed to any one to select a particular part as an exception to his general approval. The will as it stood was in all respects his real will, and it would be mischievous in the extreme to enter into speculations as to whether the whole

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or any part of a particular sentence in it was understood and adopted by the testator. In *Atter* v. *Atkinson* (1) that very matter had been attentively considered, and this danger pointed out, and it had been held that if it was proved or admitted that a testator is of sound mind, memory, and understanding, that a will has been read over to him, or that he has read it to himself, and that he has put his signature to it, the question whether he knew and approved of the contents of such will must be answered in the affirmative, and such knowledge and approval will extend to every part of such will. All these matters were established here. *Guardhouse* v. *Blackburn* (2), and *Harter* v. *Harter* (3), are to the same effect. In the former the codicil was sustained, though it was sworn by the solicitor who prepared it that words had been inserted without instructions, and by his inadvertence. In the latter, as here, the question arose on the residuary clause, and though there was evidence that the residuary clause had not been intended to be framed as the will expressed it, yet the will was sustained. That case has never been in any way impugned. Here, too, the evidence was all one way; it all shewed that the testator knew and understood the will, and had executed it. The last finding was not justified by any bit of evidence, but must have been a capricious supposition of the jury, and it was therefore properly disregarded.

Mr. *Edwards,* in reply, insisted that the last finding could not be thus overruled, but that, if not made the subject of a new trial, it must be acted upon, and that the general probate ought not to have been granted.

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THE LORD CHANCELLOR (Lord *Cairns*):—

My Lords, this appeal arises out of a proceeding in the Court of Probate, instituted for the purpose of challenging the validity of the will of *Hugh Harrison*, who died in July, 1870, his will being dated in the previous month of June.

On the examination of the case it appeared to be accompanied by circumstances which certainly were peculiar. For the purpose

(1) Law Rep. 1 P. & M. 665.
(2) Law Rep. 1 P. & M. 109.
(3) Law Rep. 3 P. & M. 11.

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of determining the questions which had been raised with regard to the validity of the will, certain issues were directed by the Court of Probate, which were tried before Mr. Justice *Mellor* at the assizes for the county of *Westmoreland*:—[His Lordship read them; see *ante*, p. 450.]

The Respondents were the persons propounding the will; they were the two executors named in it, and they were also the residuary devisees and legatees. They were not related in any way to the testator. The jurors upon these issues found the first four in favour of the Respondents, that is to say, in favour of the will. They found that the will was duly executed; that the testator was of sound mind, memory, and understanding, and that neither the will nor the residuary clause was procured by the exercise of undue influence. Then, with regard to the other two issues, the fifth and sixth, they found that he knew and approved of the contents of the will with the exception of the residuary clause, but that as to the residuary clause, he did not know or approve of its contents.

I may point out to your Lordships that the Court of Probate having decided in the first instance that this was a case in which it was proper to take the opinion of a jury with regard to the residuary clause, as distinct from the rest of the will, and the jury having found that the testator did not know or approve of the contents of the residuary clause, it is clear that the mode of ascertaining that question of fact, which had been adopted by the Court of Probate, was satisfied. The verdict of the jury was returned, and that verdict must stand unless it could be set aside upon a ground which must have gone to the fact that improper evidence had been received, or that proper evidence had been excluded, or that the verdict of the jury was against the evidence, or lastly, that the learned Judge had misdirected the jury. Upon any one of those grounds the finding might have been challenged, and a new trial directed; but no qualification of the finding having been made at the trial, no leave to take any other course having been reserved, or, indeed, having been asked for, it became quite impossible in this state of things to change the verdict found by the jury against the residuary clause, into a verdict sustaining the residuary clause.

A motion was made by the Respondents in the Court of Probate,

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the words of which I will read:—[His Lordship read them, see *ante*, p. 453.] A notice was given for a rule *nisi*, branching into two directions, the one to enter the verdict in favour of those who propounded the will, the other for a new trial. My Lords, that having come before the learned Judge, I find that an order was made—a rule *nisi* was granted: the learned judge having read this notice of motion "and heard counsel," "ordered that the Plaintiffs do, on the first day appointed for hearing motions in this Court in Trinity Term, shew cause to the satisfaction of the Court why the verdict of the jury empanelled to try the issues raised by the pleadings in this cause should not be set aside, and a new trial granted thereof, or why the verdict of the said jury on the issue, whether the deceased in this cause knew and approved of the contents of the residuary clause in the said will propounded, should not be set aside for misdirection." The rule to be applied for, therefore, having gone to the entering a verdict against the verdict of the jury, the rule *nisi* which was really granted does not adopt that form, but is granted merely to shew cause why there should not be a new trial, either, as I read, upon the ground of the verdict being against evidence, for that, I take it, must be the meaning of the first part of the rule, or, secondly, upon the ground of misdirection.

My Lords, I will not pause at this moment farther to consider what was said on the argument of that rule, but the result was that this order of the Court of Probate was made, which is now under appeal before your Lordships. "The Judge having heard counsel on behalf of the Defendants and Plaintiffs, made the rule absolute to enter a verdict for the Plaintiffs"—though the rule had not been granted for any such purpose—"and pronounced for the force and validity of the last will and testament of *Hugh Harrison*, the deceased in this cause, bearing date the 11th day of June, 1870, and of which probate was granted in the month of August, 1870, and made no order as to costs, and directed that probate should be given out to the executors."

I own, my Lords, that I have great difficulty in understanding how this order came to be made. It appears to me to have been made under some forgetfulness or misapprehension as to what was the purpose for which the rule *nisi* had been granted. Certainly even if the learned Judge of the Probate Court had been satisfied

that there was a verdict against evidence, or a misdirection on the part of the Judge at the trial, either of those considerations ought to have resulted in an order for a new trial, and not in the entering of a verdict for the Plaintiffs. In point of form, therefore, I should submit to your Lordships that it would be impossible to maintain this order.

But then arises the question, What course ought now to be taken by your Lordships? And I apprehend that you will ask yourselves the question, supposing you had been sitting upon the argument of this rule, what opinion would you have arrived at with regard to the allegation that there was here a verdict which was against evidence, or that there was here a verdict which had been obtained after a direction given by the Judge at the trial which was erroneous in point of law. I certainly found myself, and think that your Lordships would have found yourselves, under some difficulty in dealing with that question, having regard to the fact that there was not submitted to your Lordships upon the papers before you, any note of the direction of that learned Judge, or of the summing-up of the evidence given before him. The parties, however, were permitted by your Lordships to supply a copy of the shorthand writer's notes of what passed at the trial, and those notes have been considered, I think, by all your Lordships.

My Lords, looking at the shorthand writer's notes of what took place at the trial, which I have read with great care, it appears to me that nothing whatever fell from the learned Judge on the occasion of the trial which could be said to amount to a misdirection to the jury upon any question of law. I find that he, with great care, went through the whole of the evidence. He pointed out to the jury what had been deposed to in the evidence, and pointed out what had been the arguments of the learned counsel on each side. He remarked upon these matters connected with the making of this will, and connected with the instructions which had been given for the will, upon two different occasions—upon the form which those instructions had assumed—upon the circumstance that one of the persons propounding the will, one of the residuary legatees, had employed his brother, a solicitor, for the purpose of preparing the will from those instructions. He

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remarked upon the variance which occurred between the instructions, which were stated to contain the directions of the testator, and the will as submitted to the testator for execution; and he, having directed the attention of the jurymen to all these matters, and pointed out to them that the Court of Probate desired to hear from them their opinion as to the consciousness of the testator with regard to the contents of the whole of the will, and also, separately, their opinion as to the consciousness of the testator with regard to the contents of the residuary clause, the jury returned the verdict to which I have already referred. I should be of opinion that in all that was there done there was nothing which could be called misdirection in the proper sense of that term.

But, my Lords, it appears to have been argued in the Court of Probate, and it was argued very strongly at your Lordships' Bar, that there occurred at the trial a misapprehension on the part of the learned Judge as to what was stated to be an absolute and fixed rule of law; and that, because the learned Judge had not laid down before the jury that absolute and fixed rule of law with regard to the judging of the validity of a will, there was a species of non-direction on the part of the learned Judge which amounted to misdirection; or that, if that was not so, still that there was a finding of the jury in the face of evidence which ought to have led to a different conclusion.

Now, my Lords, the rule of law which is said not to have been sufficiently considered is this: It is said that it has been established by certain cases to which I will presently refer, that in judging of the validity of a will or of part of a will, if you find that the testator was of sound mind, memory, and understanding, and if you find, farther, that the will was read over to him, or read over by him, there is an end of the case; that you must at once assume that he was aware of the contents of the will, and that there is a positive and unyielding rule of law that no evidence against that presumption can be received. My Lords, I should in this case, as indeed in all other cases, greatly deprecate the introduction or creation of fixed and unyielding rules of law which are not imposed by Act of Parliament. I think it would be greatly to be deprecated that any positive rule as to dealing

with a question of fact should be laid down, and laid down now for the first time, unless the Legislature has, in the shape of an Act of Parliament, distinctly imposed that rule.

But, now, let us see what is the authority for the imposition of such a fixed and unyielding rule of law. Before looking at the two cases which were cited, I will take the liberty of reminding your Lordships of the law which has been laid down in general terms as to the mode of dealing with testamentary instruments like the present, where persons who are strangers to the testator, and who themselves have obtained or conducted the making of the will, are the persons benefiting by the will. In the well-known case of *Barry* v. *Butlin*, before the Judicial Committee of the Privy Council, Mr. Baron *Parke*, delivering the opinion of the Judicial Committee said this (1): "The rules of law according to which cases of this nature are to be decided do not admit of any dispute so far as they are necessary to the determination of the present appeal, and they have been acquiesced in on both sides. These rules are two: the first, that the *onus probandi* lies in every case upon the party propounding a will, and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator. The second is, that if a party writes or prepares a will under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased. These principles, to the extent that I have stated, are well established. The former is undisputed. The latter is laid down by Sir *John Nicholl* in substance in *Paske* v. *Ollatt* (2), *Ingram* v. *Wyatt* (3), and *Billinghurst* v. *Vickers* (4), and is stated by that very learned and experienced Judge to have been handed down to him by his predecessors, and this tribunal has sanctioned and acted upon it in a recent case." That recent case was the case of *Baker* v. *Batt* (5).

(1) 2 Moo. P. C. 480, 482.
(2) 2 Phillim. 323.
(3) 1 Hagg. Ecc. Rep. 388.
(4) 1 Phillim. 187–193.
(5) 2 Moo. P. C. 317.

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Now, my Lords, bearing in mind the general principles there enunciated, let me direct your Lordships' attention to the two cases occurring in the Court of Probate, and heard before the very learned Judge from whose decision the present appeal comes, two cases which were referred to in the argument of this case. The one is the case of *Atter* v. *Atkinson* (1), in which there is the report of a charge of Lord *Penzance* to a jury. In that case the jurors, it appears, were discharged, as they could not agree upon a verdict; but this is the portion of the charge which was referred to. I should state that that was a case in which, as here, a solicitor who was a stranger to, or at least not a relative of, the testatrix, was named as the residuary legatee under the will; but the execution of the will by the testatrix was performed in the presence of another solicitor. Lord *Penzance* there addresses the jury in these terms (2):—"The question of fact is, did Mrs. *Newcome* really ever read the contents of this document? If you are satisfied that she read it, then, as a proposition of law, I feel bound to direct you that she must be taken to have known and approved of its contents. If, being of sound mind and capacity, she read this residuary clause, the fact that she afterwards put her signature to it is conclusive to shew that she knew and approved of its contents. Reflect on the contrary proposition. Suppose that a long will with a number of complicated arrangements is read to a competent testator, and is executed by him, if we were permitted some time after his death to enter into a discussion as to how far he understood and appreciated the bearings of all the different parts of the will, we should upset half the wills in the country. Once get the facts admitted or proved that a testator is capable, that there is no fraud, that the will was read over to him, and that he put his hand to it, and the question whether he knew and approved of the contents is answered."

My Lords, although I do not think it is necessary in the present case to determine the question, I do not know that there is anything in that direction, taken as a whole, to which I could venture to make any objection; but you will observe the very important qualification—I say, "taken as a whole." In the first place the

(1) Law Rep. 1 P. & M. 665. (2) Law Rep. 1 P. & M. 670.

jury must be satisfied that the will was read over, and in the second place must also be satisfied that there was no fraud in the case. Now, applying those observations to the present case, I will ask your Lordships to observe that we have no means of knowing what was the view which the jury, in the present case, took with regard to the reading over of the will. The only witnesses upon the subject were those witnesses who themselves were propounding the will. No person else was present—no person else knew anything upon the subject. It appears that these witnesses stated either that the will was read over to the testator, or that it had been left with him over-night for the purpose of being read over. The jury may, or may not, have believed that statement, or may have thought, even if there had been some reading of the will, that that reading had not taken place in such a way as to convey to the mind of the testator a due appreciation of the contents and effect of the residuary clause—and it may well be that the jurors, finding a clear expression of the intention of the testator, or what they may have thought to be a clear expression of the intention of the testator, in the instructions for the will, were not satisfied that there was any such proper reading or explanation of the will as would apprise the testator of the change, if there was a change, between the instructions and the will.

But, my Lords, moreover, how does the qualification that there must be no fraud bear upon the present case? It is very difficult to define the various grades or shades of fraud; but it is a very important qualification to engraft upon the general state of things, that the reading over of a will to a competent testator must be taken to have apprised him of the contents. If your Lordships find a case in which persons who are strangers to the testator, who have no claim upon his bounty, have themselves prepared, for their own benefit, a will disposing in their favour of a large portion of the property of the testator; and if you submit that case to a jury, it may well be that the jury may consider that there was a want, on the part of those who propounded the will, of the execution of the duty which lay upon them, to bring home to the mind of the testator the effect of his testamentary act; and that that failure in performing the duty which lay upon them, amounted to a greater or less degree of fraud on their part. The qualification

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of Lord *Penzance* in the charge I have read may entirely apply to such a case.

The other case which came before the same learned Judge is that of *Guardhouse* v. *Blackburn* (1). In that case the learned Judge laid down certain propositions which he said commended themselves to his mind as rules which since the statute ought to govern his action in respect of a duly executed paper; and the statement of those rules was this (2): "Thirdly, although the testator knew and approved the contents, the paper may still be rejected, on proof establishing, beyond all possibility of mistake, that he did not intend the paper to operate as a will. Fourthly, that although the testator did know and approve the contents, the paper may be refused probate if it be proved that any fraud has been purposely practised on the testator in obtaining his execution thereof. Fifthly, that,' subject to this last preceding proposition, the fact that the will has been duly read over to a capable testator on the occasion of its execution, or that its contents have been brought to his notice in any other way, should, when coupled with his execution thereof, be held conclusive evidence that he approved as well as knew the contents thereof."

Therefore, my Lords, I come to the conclusion that, even if these rules, laid down in this way by Lord *Penzance*, are to be accepted as rules which should be applied to the case of every testamentary instrument, still, with regard to the present case, they do not carry to my mind any persuasion that there was a non-direction, on the part of the learned Judge who tried the cause, in a matter which he ought to have laid before the jury. It appears to me that, consistently with the rules mentioned by Lord *Penzance*, the jurors here may not have been satisfied that there was a proper reading of the will to the testator, or may have been satisfied, after hearing all the facts submitted to them by Mr. Justice *Mellor*, that there was on the part of those who propounded the will such a dereliction of duty, such a failure of duty on their part, as amounted to that degree of fraud to which Lord *Penzance* refers in the rules I have mentioned.

My Lords, I therefore arrive at the conclusion that there was no positive misdirection on the part of Mr. Justice *Mellor*. I arrive

(1) Law Rep. 1 P. & M. 109. 12 Jur. N.S. 278

(2) Law Rep. 1 P. & M. 116. 12 Jur. N.S. 281

at the conclusion that there was no failure on his part by reason of his not laying down some unyielding and absolute rule of law such as was suggested at the Bar; and I also arrive at the conclusion that there was no finding of the jury which could be called a finding in opposition to evidence; for it was suggested that it might be viewed in that light. It was suggested that, when once the jurors had before them uncontroverted evidence that the will was read over to the testator, any verdict on their part that the residuary clause was not known to the testator would be opposed to their finding upon the issue that he was of sound and disposing mind. I say that that again was a question for the jurymen, and it might well be that they would not believe the evidence with regard to the reading over of the will. Upon these grounds, endeavouring to place myself in the position in which the Court of Probate was placed when it had to deal with this rule *nisi*, I feel myself obliged to say that there was nothing which could be alleged against this verdict of the jury which required the Court to direct a new trial. It was eminently a question for the jury, and I see no reason whatever to be dissatisfied with the verdict.

I will only refer to one other subject which has been very much argued before your Lordships, and I refer to it lest it should appear to have escaped observation. It was said that there was a general rule in the Probate Court which had not been complied with in this case, and that evidence was allowed to be adduced at the trial, which, having regard to that rule, ought not to have been laid before or considered by the jury. My Lords, that rule and the particulars were in these words:—[His Lordship read them; see *ante*, p. 450]. It was said that these particulars must be read as if the second part was intended to be exactly co-extensive with the first—that the only allegation in the particulars was an allegation of mental prostration brought on by habitual drunkenness and disease of the brain, that the words "and that he was not in fact" "conscious of and did not approve of the contents" of the will, must be referred to that state of mind and body, and that unless that state of mind and body was established, the case suggested by the particulars could not be held to have been proved.

My Lords, I do not in the first place read the particulars in that way. It appears to me that it would be much too strict a con-

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struction to put upon them to hold that the two portions of that clause are identical. But, farther, I have not satisfied my mind that the rule in question applies at all to an issue like the sixth. The rule expressly, on the face of it, applies only to the first five pleas or issues; they are set out upon the face of the rule, and it is said that, with regard to those issues, particulars must be delivered, and evidence of the kind I have mentioned must be given. With regard to this pleading, the sixth issue in this case was on a plea pleaded by special leave of the Court, and I do not find that any terms whatever were imposed with regard to the particulars to be given under that plea.

But, in addition to that, I will ask your Lordships' attention to this circumstance. It appears to me impossible that any person reading those particulars could have supposed that they applied to the sixth issue as well as to the fifth; because, if you hold that the particulars apply to both issues, and are to be construed as the Respondents construe them, the consequence would be this—the particulars would amount to a suggestion that the testator was in a state of mental prostration brought on by habitual drunkenness and disease of the brain, so that he could not be conscious of, or approve of, the contents of the whole will, but that still, that disease and prostration may have been of so singular a kind, that he could approve of the contents of the whole will *minus* the residuary clause, but could not approve of the contents of the residuary clause. My Lords, that would be reducing the meaning of the particulars to an absurdity, and I think they could not have been so treated or understood by any person who read them.

But, my Lords, I am not satisfied that there is anything in the rule which gives the particulars the effect contended for; and bearing in mind especially, that no objection whatever was taken at the trial in this case, when some amendment might have been permitted, this point cannot now be taken with success at your Lordships' bar.

The result of the whole is this: I move your Lordships to allow the present appeal, and, making now the order which ought to have been made in the Court of Probate, to discharge with costs the rule obtained for a new trial; to reverse the order of the Court of Probate giving out probate of the whole will, and, with that direc-

tion, remit to the Court of Probate to do what is right with regard to qualified probate of this will.

LORD CHELMSFORD:—

My Lords, I agree entirely with my noble and learned friend.

The Judge of the Probate Court having sent down certain issues to be tried by a jury, and the jury having returned a distinct finding upon each issue, it was not in his power afterwards to change that verdict into a different one. If there had been liberty reserved at the trial for the party against whom the verdict upon the sixth issue had been pronounced, to move the Court to alter that verdict, and to change it into a verdict for him, that undoubtedly would have given the Judge power so to alter the verdict. But no such leave was reserved, and no rule to that effect was granted by the learned Judge. The notice of the application proposed on the part of the Plaintiffs was, first of all, that probate of the will should be delivered out notwithstanding the finding upon the sixth issue; or secondly, for a rule to shew cause why a new trial should not be granted upon the ground that the verdict was against the weight of the evidence, and for misdirection. But what was the rule which was granted after that notice? The rule called on the Defendants to shew cause why the verdict of the jury empannelled to try the issues raised by the pleadings in this cause should not be set aside, and a new trial granted thereof, or why the verdict of the said jury on the issue whether the deceased in this cause knew and approved of the contents of the residuary clause in the said will propounded should not be set aside by reason of misdirection. That is as I read this rule, upon each question, that the verdict generally of the jury should be set aside, or the verdict of the jury upon the sixth issue should be set aside upon the ground of misdirection. Therefore the only question which the learned Judge had to decide upon the rule which he himself had granted, was, whether a new trial ought to be had generally, or whether it ought to be had, specially, as to the sixth finding, upon the ground of misdirection. Instead of adopting the proper course the learned Judge, certainly in the most extraordinary way, there being no liberty reserved to enter a different

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verdict from that which had been found by the jury, took upon himself to decide that which the jury alone had a right to decide, and ordered that a different verdict should be entered.

Now it being perfectly clear that that order cannot be maintained, the only question before your Lordships really was, or ought to have been, whether a new trial should have been granted on the ground of misdirection. Unfortunately we had not the assistance we ought to have had upon this question. What we might have expected would have been that the learned counsel should have shewn us in what respect the summing-up of the learned Judge amounted to a misdirection. Nothing of that kind was pointed out to us, but we had the great advantage of seeing the short-hand-writer's notes of the summing-up, and it was left to us to find our way through that summing-up for the purpose of ascertaining whether there was any misdirection or not. I have read every part of the summing-up of the learned Judge which related to the particular issue in question, and I agree entirely with my noble and learned friend that there is nothing on which we can found any opinion that there has been a misdirection; nor do I find that there was any inflexible rule upon the subject of the validity of a will which the learned Judge omitted to present to the jury.

My noble and learned friend has gone so much at length into the question of non-direction that I will merely say that I entirely agree with him that there is neither misdirection nor non-direction in the present case; and therefore, as the order of the learned Judge of the Probate Court cannot stand, and as there is no possibility of sending the case to a new trial upon the ground of misdirection on the part of Mr. Justice *Mellor*, I think the course suggested by my noble and learned friend is the proper one for your Lordships to adopt.

LORD HATHERLEY:—

My Lords, I entirely concur with the observations which have already been made upon the subject of this will, and I have but very few observations to make in addition.

A matter which appears to me deserving of some remark, and

upon which the Lord Chancellor has already fully commented, is the supposed existence of a rigid rule, by which, when you are once satisfied that a testator of a competent mind has had his will read over to him, and has thereupon executed it, all farther inquiry is shut out. No doubt those circumstances afford very grave and strong presumption that the will has been duly and properly executed by the testator; still circumstances may exist which may require that something farther shall be done in the matter than the mere establishment of the fact of the testator having been a person of sound mind and memory, and also having had read over to him that which had been prepared for him, and which he executed as his will. It is impossible, as it appears to me, in the cases where the ingredient of fraud enters, to lay down any clear and unyielding rule like this. One is strongly impressed with the consideration that, according to the natural habits and conduct of men in general, if a man signs any instrument, he being competent to understand that instrument, and having had it read over to him, there is a very strong presumption that it has been duly executed, and that very strong evidence is required in opposition to it in order to set aside any instrument so executed.

Now, my Lords, laying down, for my own part, no general rule of any description whatever, which I carefully avoid doing with reference to cases of this description, I desire to call your Lordships' attention for a moment to the position in which the matter stood before the jury upon the issues directed. The case was one in which the other parts of the will were of a very ordinary character, consisting of dispositions and bequests to the testator's relatives and friends. But when you come to the gift of the residue, you find that that gift is made to two persons who had no such special claim upon the testator's bounty. You find an issue directed to that state of things, and farther directed to this, that the will had undoubtedly, and *ex concessis*, been framed through the agency of those who took this benefit in the residue; that is to say, that one person who took the benefit in the residue, and who, with his co-residuary legatee, alone supported the case of the will having been read to the testator, that one person called in another

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person, who was the other residuary legatee, and who had once been in the testator's service to the extent of writing a few letters for him, but was then acting as a solicitor's clerk in a neighbouring town. The person so called in took down the instructions, and when that had been done, neither of the residuary legatees thought fit to send those instructions to the testator's ordinary solicitor, and consequently the testator had not the protection which a man receives from the solicitor whom he has been in the habit of employing, but the instructions were sent to a brother of one of the residuary legatees, who himself was practising as a solicitor.

There were other grave circumstances attending the transaction. Any one reading over those instructions, which were given on two separate days, namely, the 30th of May and the 9th of June, will see some very remarkable circumstances attending the gift to the residuary legatees. In the first set of instructions, which were given on the 30th of May, after giving to his nieces *Isabella* and *Margaret Fulton* £1000 each (with certain family portraits), when they attained the age of twenty-one, the money to be invested in the meantime by the trustees; when he arrives towards the end of such dispositions, there is a gift of a New Testament to a certain Archdeacon *Boutflower*, and then you come to these words: "*C. B. Andrew* and *Thomas Wilson* executors and trustees for the children. Residue to executors." That is the first set of instructions, and certainly upon those instructions it would be open at all events to question (it is not necessary to say a word more than that) whether or not the residue was not given to them as trustees for the children. Then, when you come to the set of instructions given on the 9th of June, you find that the bequest is this—it is a little varied—"Residue to executors (and trustees for the children), the said *C. B. Andrew* and *Thomas Wilson*." The same remark would apply exactly to that form of instructions. Then there is a curious note in the margin, we were told that these notes were prepared by the solicitor, "Trustees for children not necessary. Father is their guardian." Certainly that is, to say the least of it, under the circumstances, a somewhat suspicious note. It is suggested that trustees are unnecessary because the father of the nieces is their guardian. That is a singular reason to give—

perhaps it might be the very reason why trustees might be necessary, to protect them against unwise paternal influences. And, finally, the will in the residuary clause leaves out the word "trustees," and simply gives the residue to the executors.

It is impossible to say that there was not a grave case to try, and what is more, the Court thought so. The Court thought fit to direct issues as to the whole will and as to the residuary clause. It was necessary, therefore, for the jurors to come to a conclusion as to whether they were satisfied that the testator knew what he was doing with regard to the whole will; and if they thought he did not know what he was doing as to the whole will, whether they were satisfied that he knew what he was doing, or what he is alleged to have done, with reference to the residuary clause. As the learned Judge said at the trial, this is not a usual or common issue, but the circumstances of the case required it. The learned Judge from whom this appeal comes, had himself directed the issue in that form; and there are cases, which it is not necessary to cite, where one portion of a will has been established while another portion of that same will has been rejected.

That being the case, my Lords, it would appear to me, I confess, that there was not that inconsistency in the findings, which the learned Judge Ordinary seems to have thought there was, when the case came back to him. The jurors found that they were satisfied that the testator was not a person of the description alleged by the present Appellants, namely, a person of intemperate habits, which had deprived him of his mind and understanding. They found that they were satisfied on that point, and that they were satisfied also that he had properly executed the will, with a knowledge of its contents, except as regards the residuary clause; they found as to the residuary clause, that it was not so. Now, they had to be satisfied of that. There is one rule which has always been laid down by the Courts having to deal with wills, and that is, that a person who is instrumental in the framing of a will, as these two persons undoubtedly were, and who obtains a bounty by that will, is placed in a different position from other ordinary legatees who are not called upon to substantiate the truth and honesty of the transaction as regards their legacies. It is enough

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in their case that the will was read over to the testator and that he was of sound mind and memory, and capable of comprehending it. But there is a farther onus upon those who take for their own benefit, after having been instrumental in preparing or obtaining a will. They have thrown upon them the onus of shewing the righteousness of the transaction. Now, how did these persons discharge this onus in the present case? They only discharged it by themselves giving evidence before the jury of the reading over of the will, and they were the only persons who did give that evidence. It would not have been difficult for them to have had other persons present when the reading over of the will took place; but that does not appear to have been done.

With all these circumstances attached to the will, it does appear to me, my Lords, that it was perfectly competent for the jurors, regard being had to all the circumstances of this case, to say, we are satisfied that the testator was in a condition to make such a disposition as he has made with reference to his friends and relatives, but we are not satisfied, having only the evidence of the persons interested, that the effect of the clause with regard to the gift of the residue was made clear to him, especially when we find instructions existing which, at least, admit of a contrary interpretation, treating those who are to take the residue as mere trustees; finding those instructions existing, when we find a clear, absolute, and express gift to those persons in the residuary clause of the will, we are not satisfied that the testator was made to see the distinction, or to observe the difference between the instructions and the will.

My Lords, I have looked over the learned Judge's directions, and I ask the question, has the learned Judge either given to the jury any direction which in point of law he ought not to have given, or has he withheld from the jury any direction which he ought to have given? I find that the learned Judge has, in as strong language as any that I could use, and no doubt in much better language, expressed to the jurors the great caution they should exercise in coming to a conclusion adverse to a will which a person of sound mind, memory, and understanding has executed after having had it read over to him. On the other hand, the learned

Judge has pointed out, as he was bound, as it appears to me, to do, that their attention should be carefully directed to the question, whether or not, regard being had to the peculiar circumstances of this particular gift, regard being had to the instructions emanating from those persons who are to have the benefit of the gift, and regard being had to the amount of evidence put before them as to the reading of it over to the testator, the difference between the instructions and the form of the will had been made clear to his mind. The learned Judge places all these, among other things, before the jury, but leaves the question entirely for the jury to determine. It appears to me, that from the beginning to the end every single question which ought properly to have been submitted to the jury, was present to the mind of the learned Judge, and was conveyed by him to the minds of the jurymen; and I cannot, myself, see any single point in which he has erred by omitting to direct their attention to any circumstances which in this peculiar case required notice.

The case is a singular one in its character, and without wishing to shake the force of the observations made by the learned Judge of the Probate Court, as to the danger (which is a real danger) of holding that any man of sound mind who has put his hand to an instrument after having had that instrument read over to him, can have meant otherwise than what he said; admitting all that, yet I do say that at least the jury should be satisfied that it was read over to him, and not only that it was read over to him, but that it was read over in such a manner as that the discrepancy between the instructions and the will was brought before the consideration of the testator. It appears to me that in this case there is nothing to induce us to say that the jurors were not warranted in their conclusion.

My Lords, upon the question of form, though it is something more than form, it is to a certain degree a question of substance, the order which has been made by the learned Judge in the Court below (I think it must have been by some accident, probably his attention was not called to the circumstance) is utterly inconsistent with the rule against which the Plaintiffs had to shew cause. It is impossible for us to maintain that order, and having regard to

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all the circumstances of the case I entirely agree in the motion that has been made to your Lordships by the Lord Chancellor.

LORD O'HAGAN:—

My Lords, I am entirely of the same opinion, and any observations which I had thought of submitting to your Lordships have been largely anticipated, especially by my noble and learned friend on the woolsack: It appears to me that the judgment now under the consideration of your Lordships is unmaintainable, either in form or in substance.

It is a judgment which not only ignores, but purports to reverse, a finding of a jury. It affects to enter up a verdict in opposition to their verdict, there being no leave reserved to enter it up, nor any consent of parties for that purpose. And this is done on a conditional order, which goes merely for a new trial. I think that the order subsequently made to enter a verdict for the Plaintiffs, pronouncing for the validity of the will of which probate was granted in August, 1870, and directing that probate should be given to the executors, is wholly without authority or precedent. The ultimate decision dealt with the matter as if both branches of an alternative rule, to set aside a verdict, or to enter up judgment notwithstanding a verdict, had been left open. This appears to me to have been, according to the practice with which we have been heretofore familiar, a manifest irregularity, and, upon that ground, I am quite of opinion with the noble and learned Lords who have already addressed the House, that the judgment cannot stand.

Upon the matter of substance I, also, have had the advantage of looking over the notes of the charge of the learned Judge, and I have failed to discover any misdirection in the course of that charge. The learned Judge appears to me, in the clearest and fairest way, to have submitted to the jury all the facts of the case in their proper relation to the issues which he also clearly explained. The jurors had to consider a question which was especially one for their consideration, and they only were competent to decide it. They had to decide as to the credibility of the only witnesses who spoke to the material facts which have

been assumed as the foundation of the ruling of the learned Judge. The witnesses who spoke to those facts were only two in number, and they may have been impeachable in various ways, as to character, manner, and demeanour, and other considerations which may be taken into account by a jury in estimating the value and sufficiency of evidence. They both had the deepest interest in the result, and the question was whether their evidence was satisfactory on those points which the learned Judge assumes to have been conclusively demonstrated.

My Lords, in this state of things, without giving any absolute opinion upon the principle enunciated in those cases which have been referred to by my noble and learned friend the Lord Chancellor, *Guardhouse* v. *Blackburn* (1) and *Atter* v. *Atkinson* (2), and deciding whether or no you should make a rigid rule as to the assumption from certain facts that there must be a certain result in law, it appears to me that in this particular case the principle, good or bad, does not apply at all. The condition of applying such a principle must be the ascertainment either of uncontradicted facts, or of facts so proved as to be beyond all controversy. In this case it is impossible to say that that is so. It is impossible to say that there was not a most serious question of fact for the jury to determine, and, that being so, it appears to me, my Lords, that the learned Judge not only did not do wrong in refusing to bind the consciences of the jury by a strict conclusion of law, but that he would have done wrong if he had attempted to do any such thing. It appears to me that a direction, such as has been contended for at the Bar of your Lordships' House, to the jury to find in a particular way would have really amounted to a misdirection.

Therefore, my Lords, upon the whole, whether I look to the form of the judgment, the grounds on which it has been pronounced, the circumstances which anteceded it, or the substance of it in relation to the conduct of the case before the learned Judge in the Court below, I think that is not maintainable, that the suggestion which has been made by my noble and learned friend on the

(1) Law Rep. 1 P. & M. 109. (2) Law Rep. 1 P. & M. 665.

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woolsack should be adopted, and that the verdict as pronounced by the jury ought to stand.

The following Order was made:—

It is Ordered, That the order of the Court of Probate of the 18th of June, 1872, complained of, be reversed; and that the rule *nisi* granted by the said Court for a new trial be discharged with costs: And that the cause be remitted back to the said Court of Probate, with directions to make such farther order as to recalling probate of the will of *Hugh Harrison*, granted on the 19th of August, 1870, and granting fresh probate of the said will, omitting the residuary clause, as may be right.

Lords' Journals, 16th February, 1875.

Solicitors for the Appellants: *J. Whitehouse.*
Solicitors for the Respondents: *Hughes & Son.*

THE MAYOR AND CORPORATION OF LONDON AS GOVERNORS OF ST. THOMAS' HOSPITAL } PLAINTIFFS IN ERROR; 1875 March 1.

AND

STRATTON AND ANOTHER . . . . . } DEFENDANTS IN ERROR.

Public Hospital—Charter to a Corporation—Parish Rates—Poor.

St. Thomas' Hospital was founded by charter of *Edward* VI., and lands were given, and the funds arising from the property vested, for the purposes of the charter, in the mayor and corporation of *London*. The charter directed the appointment and payment of the officers necessary for such an establishment, and directed that the residue of the revenues should be spent for "the use and maintenance of the poor, sick, and infirm folk of the said hospital":—

Held, that the rule laid down in the cases of *The Mersey Docks* v. *Cameron* (1) and *Greig* v. *The University of Edinburgh* (2) applied here; and that *St. Thomas' Hospital* was liable to be rated to the relief of the poor of the parish.

ERROR upon a decision of the Court of Exchequer Chamber, which had affirmed a previous decision of the Court of Queen's Bench.

The Plaintiffs had brought replevin against the Defendants, the overseers of *St. Mary, Lambeth*, for taking a distress for rates assessed upon the hospital. The Plaintiffs contended that *St. Thomas' Hospital*, founded in virtue of letters patent of the fifth and seventh years of *Edward* VI. was entirely a place for the relief of sick and poor people, and was not rateable to the parish. The grant was to the mayor, commonalty, and citizens of *London*, of lands that had lately belonged to the "*Hospital of Thomas Beckett in Southwark*, late commonly called the *Hospital of St. Thomas in Southwark*." The grant was made for "the cure and maintenance of sick and infirm poor," and after directing the appointment of divines, officers, nurses, surgeons, &c., contained the following clause: "And we will, and do by these presents declare, that the residue of all the revenues of the premises, beyond the wages of the officers and ministers aforesaid, and

(1) 11 H. L. C. 443. (2) Law Rep. 1 H. L., Sc. 348.

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beyond the charges of the necessary repairs of the said Hospital and House of the Poor, and of other the premises, to be from the revenues of the same allowed and deducted, shall be yearly and from time to time spent for the use and maintenance of the poor, sick, and infirm folk of the said Hospital and House of the Poor, as shall be to them most fit and expedient." And in order to secure that the revenues should be expended as directed, "and not otherwise," a power was reserved "to us, our heirs and successors, to appoint commissioners to visit the said hospital," &c. The hospital, as it now exists, stands upon the southern embankment of the River *Thames*, being built partly on land reclaimed from the river, which had never before been rated, and partly on land which had before been occupied and rated in the usual way. Both kinds of land were within the parish of *St. Mary, Lambeth.* A case was stated for the Court of Queen's Bench, and the Judges of that Court, thinking that there was no distinction between the cases of *Jones and of Cameron* v. *The Mersey Dock Trustees* (1), followed by *Greig* v. *The University of Edinburgh* (2), and that of *St. Thomas' Hospital*, at once gave judgment against the Plaintiffs. On error to the Exchequer Chamber that judgment was, on the same grounds, affirmed. The case was then brought up to this House.

Mr. *Benjamin*, Q.C., and Mr. *Wills*, Q.C. (Mr. *Poland* and Mr. *Archibald Smith* were with them), for the Plaintiffs in Error :—

There is a marked distinction between the case of *St. Thomas' Hospital* and that of the *Mersey Docks.* In the latter tolls were received, profits might be made, nay, were anticipated to be made, and the application of a part of them in the diminution of the amount of tolls demandable was provided for. So in *Greig* v. *The University of Edinburgh* (2) profits were receivable. Here the property cannot produce anything in the shape of profit. The whole revenue from all the premises, the subject of the grant, is devoted to the sick and poor. There was nothing therefore which could be so dealt with as to bring in a profit to the mayor and citizens of *London*, and it was only property that could be so dealt with to which the principle of rateability was applied. There

(1) 11 H. L. C. 443. (2) Law Rep. 1 H. L., Sc. 348.

were no tolls, there was no rent, nor anything from which rent could be obtained. It was according to the ability of the occupier that the rate was, by the provisions of the statute of *Elizabeth*, to be calculated. Here there was none of that ability which the statute contemplated; the occupation was for the purposes of charity alone, it produced no profit to any one, while the governors were under the obligation to provide medical attendance and medicines, which, in most cases, must otherwise be provided by the parish. The parish therefore was benefited, not burdened, by the hospital. The mayor and corporation, taken even as a corporate body, could not receive any benefit from the hospital; they were made the governors of the hospital, not for any benefit which they were to receive, but for a duty which they must perform. The officers named in the charter were the only occupants, and in no sense whatever could the mayor and citizens be said to occupy the premises. They were mere administrators of the funds at the desire of the Crown. The charter itself (1) declared what persons should be kept to discharge the duties of the hospital and to take care of the sick, and it went on thus:—"And we will, and do by these presents declare, that the residue of all the revenues of the premises, beyond the wages of the officers and ministers aforesaid, and beyond the charges of the necessary repairs of the said Hospital and House of the Poor, and of other the premises, to be from the same allowed and deducted, shall be yearly and from time to time spent for the use and maintenance of the poor, sick, and infirm folk of the said Hospital and House of the Poor," so that every farthing of the income of the hospital was expressly appropriated, and the mayor and corporation had nothing to do but to dispense the revenues as required in the charter, and could not take the smallest portion of them. The case of the *Mersey Docks* (2), and *Greig* v. *University of Edinburgh* (3), which followed it, were therefore distinguishable, and the judgments of the Courts below could not be sustained.

Mr. *Manisty*, Q.C., and Mr. *F. Meadows White*, for the Defendants in Error, were not called on.

(1) Printed Papers, p. 10–11. (2) 11 H. L. C. 443.
(3) Law Rep. 1 H. L., Sc. 348.

11 Jun 1746

1875

GOVERNORS OF ST. THOMAS' HOSPITAL v. STRATTON.

LORD CHELMSFORD :—

My Lords, I need only say that it appears to me that it is impossible to distinguish this case from the view taken by your Lordships in the two cases of *Jones and of Cameron* v. *The Mersey Docks and Harbour Board* (1) and *Greig* v. *The University of Edinburgh* (2). I therefore move your Lordships that the judgment of the Court of Exchequer Chamber be confirmed.

LORD HATHERLEY :—

My Lords, I entirely concur in the opinion expressed by my noble and learned friend. I have, in consequence of the argument addressed to us, read the statement referred to by Mr. *Benjamin*, which is set out in the printed papers; and I cannot find anything there which ought to authorize us to distinguish between this case and that of any other public charity where the parties are not prohibited from making any use of the property other than that which is mentioned in the Act of Parliament or grant by the Crown. When the case comes to be considered, I certainly see nothing to distinguish it from the ordinary case of a grant of lands for a specific purpose, with a general direction that the rents arising from the lands granted shall be applied towards that purpose. There is nothing to say that they shall for ever be kept to the hospital, but whether that would or not have made a distinction I do not say.

LORD SELBORNE :—

My Lords, I concur.

Judgment of the Court of Exchequer Chamber affirmed.

Lords' Journals, 1st March, 1875.

Attorneys for Plaintiffs in Error: *Cookson, Wainewright, & Pennington.*

Attorneys for Defendants in Error: *Charles Rogers & Son.*

(1) 11 H. L. C. 443. (2) Law Rep. 1 H. L., Sc., 348.

SIR H. MEUX AND THE COMMITTEES OF HIS ESTATE . . . . . } APPELLANTS;

AND

HENRY JACOBS . . . . . RESPONDENT.

1875
March 2.

Bills of Sale Act (17 & 18 *Vict. c.* 36)—*Mortgage—Fixtures—Bankruptcy.*

The *Bills of Sale Act* (17 & 18 Vict. c. 36) declares, by the interpretation clause, fixtures to be "personal chattels," but makes them so only for particular purposes, such as are therein described, and not for all purposes and under all circumstances whatever.

Per LORD SELBORNE:—Observations on the effect of an interpretation clause.

A mortgage of premises will pass the fixtures upon the premises. A mortgage of a lease made by the lessee will carry the fixtures of that property which is in lease, and the power to remove which fixtures was in the tenant. Fixtures attached by the mortgagor to the property after the date of the mortgage, will also (unless under special stipulations) pass to the mortgagee.

There is no difference in this respect between a mortgage in fee by a freeholder and a mortgage by way of assignment of a term by a leaseholder.

The Act is intended to operate in cases between an assignee of chattels and creditors represented by the assignee in bankruptcy, or between the assignee of chattels and an execution creditor.

Per LORD HATHERLEY:—As to chattels attached to the property subsequently to the deposit of the lease, the mortgagee of the lease stood in the same position as his mortgagor, and those things when attached to the freehold passed during the interest that still remained in the lease.

A. was the lessee of a public house. On obtaining, in 1869, from *M.* a loan of £800, he deposited the lease with *M.*, together with a memorandum reciting that it was deposited as security for the loan, and for any money that might become due to *M.* for goods sold, and for the expense of "insuring the premises and the fixtures and fittings therein" from fire, and the memorandum also contained an undertaking to execute, when required, a legal mortgage. In April, 1873, *A.* borrowed a sum of £55 from *J.*, and gave *J.* a bill of sale of the fixtures and fittings. *J.* afterwards put a man in possession and advertised the fittings for sale. *M.* thereon filed a bill to restrain the sale.—*Held*, that the equitable mortgage effected in 1869 passed the fixtures and fittings, and did not require registration under the *Bills of Sale Act* (17 & 18 Vict. c. 36) to give it effect as to them.

IN 1869 *James Allen* was possessed of the lease of a house called the *White Swan*, in *Park Street, Grosvenor Square*, which he held for the residue of a term of fifty-six years from the 25th March, 1824, and to the fixtures and fittings therein. Being in want of

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money for the purpose of carrying on his business, he obtained from Messrs. *Meux & Co.*, upon the 11th August, 1869, a loan of £800, and, as security for its payment, deposited this lease, and also executed a deed-poll, dated on that day, whereby he acknowledged the deposit of the said lease as security for the payment of the loan, with interest at 5 per cent., and also for the payment of such other debts as then were, or should thereafter become, due to the said firm from him for goods sold, or money lent, or for insuring the premises, fixtures, and fittings therein against damage by fire, or upon any other account whatever; and he undertook to execute on demand a legal mortgage of the premises.

On the 17th of April, 1873, *Allen* executed and delivered to *Jacobs* a bill of sale whereby, in consideration of a loan of £55, he assigned to *Jacobs*, his assigns, &c., all the goods, chattels, property, and effects mentioned in the schedule thereto, and all other the goods and chattels then in and about the premises, to hold the said goods and chattels, property and effects, and other the premises thereby assigned, for securing payment of the said £55, and he appointed the Respondent his attorney for that purpose; and power to enter and take the goods and to sell them was expressly given. Among the things mentioned in the schedule to this indenture were "bar fittings and fixtures—gas fittings throughout the house."

On the 7th November, 1873, there being then due to the firm of *Meux & Co.* a sum of £864 16*s.* 3*d.*, *Allen*, according to his undertaking in the deed-poll of August, 1869, executed to the trustees of the estate of Sir *H. Meux* a mortgage of the premises called the *White Swan*, and all the premises demised by the lease, with their appurtenances, together with the lease and all benefit of licences, &c.

In this mortgage no mention was made of fixtures. The fixtures and fittings in the house consisted partly of what had been there before the date of the deed-poll, and partly of those which had been added subsequently.

Default having been made in payment of the £55, *Jacobs* sent a broker, who, on the 29th of October, 1873, entered and took possession of the fittings and fixtures. This fact coming to the knowledge of the Appellants, they, on the 13th of November, filed a bill in Chancery, setting forth the deposit of the deeds, and the

subsequent execution of the mortgage, and prayed that *Jacobs* might be restrained from selling. Answers and affidavits having been put in, the case came on, as on motion for a decree, on the 22nd of January, 1874, before the Master of the Rolls, when his Honour dismissed the Plaintiffs' bill with costs (1).

This was an appeal against that decision.

Mr. *Fischer*, Q.C., and Mr. *C. R. Freeling*, for the Appellants:—

Neither the equitable mortgage created in favour of the Appellants by the deposit of the lease, nor the subsequent execution of the legal mortgage, required registration in order to perfect the Appellants' title to the premises and the fixtures there. In the first place, as is now known, there was no registered bill of sale which could be set up in opposition to their title. In the next place, the bill of sale was itself absolutely valueless; it purported to assign to the Respondent what had already passed by the mortgage, and had become vested in the Appellants. A lessee, while he continues lessee, may remove trade fixtures, and may therefore dispose of them by mortgage of the premises on which they are placed, and, when they pass as incident to the mortgage, they are not personal chattels, which require for their transfer registration under the *Bills of Sale Act*. That Act in no way affects this case. *Ex parte Daglish* (2) does not govern it, for there the fixtures were made the subject of specific conveyance, and the power to sell them was specially given, and so far, but only so far, as the deed operated as an assignment of trade fixtures, it was held to require registration under the *Bills of Sale Act*. Besides, the contest there was between the unregistered mortgagee and the trustee under a liquidation—in other words, a bankruptcy—to meet which case the Act was specially created. There is no such contest here. In *Begbie* v. *Fenwick* (3) the two opposing creditors held the same form of security, and he who first registered his security

(1) It appeared that, from the manner in which the case had been presented to his Honour, he believed that the assignment to *Jacobs* had been duly registered, and he so stated in his judgment; but in fact there had not been, as to any of the instruments, any registration at all. The case was now argued on the effect of a mortgage of the premises as to passing the fixtures and fittings therein, and on the question whether a registration of it was necessary for that purpose (see WN 1874 16)

(2) Law Rep. 8 Ch. Ap. 1072.

(3) Law Rep. 8 Ch. Ap. 1075, n.

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of course obtained the priority. In no respect is either of those cases like the present. A mortgage of premises carries with it, as incident to it, the fixtures that are upon them; that is so whether the mortgagor is the freeholder, or a tenant for a term of years; *Mather* v. *Fraser* (1) really establishes that doctrine. The mortgage, which carries with it the fixtures on the premises, is not a bill of sale of those fixtures within the meaning of the *Bills of Sale Act*, nor are fixtures passing under such a mortgage "personal chattels" within the contemplation of that Act. They are "chattel interests in real estates" which are expressly excepted from its operation.

The Respondent is not within any description of the persons in whose favour the statute avoids an unregistered bill of sale.

Mr. *Edwin Ward* for the Respondent:—

These were trade fixtures, and would not pass by a mortgage of the premises themselves; and they were not specifically included in the mortgage of August, 1869. *Allen* therefore had full power to dispose of them, by assignment, as he did dispose of them to the Respondent. But, if it is said that they did pass by the original mortgage, then they must have passed as personal chattels, for the Act (17 & 18 Vict. c. 36) in the interpretation clause expressly declares that "goods, fixtures, and other articles capable of complete transfer by delivery," shall be deemed personal chattels, and, being personal chattels, the transfer of them brought them within the operation of the *Bills of Sale Act*, and the transfer of them required registration. The transfer not being registered they were liable to be seized by an execution creditor, for the Act makes void an unregistered transfer as "against every person on whose behalf process of execution shall have been issued." *Ex parte Daglish* (2), *Fenwick* v. *Begbie* (3), and *Hawtry* v. *Butlin* (4), are expressly in point. In the last-named case there was, as there is here, a mortgage by way of demise; yet the indenture, being also an assignment of fixtures, was held to be within the *Bills of Sale Act* and to require registration. So that either the fixtures do not pass by the mort-

(1) 2 K. & J. 536; 25 L. J. (Ch.) 361. 2 Jur. N.S. 900
(2) Law Rep. 8 Ch. Ap. 1072.
(3) Ibid. 1075, n.
(4) Law Rep. 8 Q. B. 290.

gage, and then the tenant may assign them and his assignee may take possession of them; or they do pass by the mortgage, and then, being personal chattels within the words of the statute, the transfer of them requires registration. [LORD SELBORNE referred to *Mather* v. *Fraser* (1).] In that case the land mortgaged was freehold; here the subject of the mortgage was the residue of a term of years, and there is a great distinction between what will pass in the one case and in the other. Vice-Chancellor *Wood* in his judgment there expressly referred to that distinction as affecting trade fixtures, and even as affecting such things as were not really affixed to the soil, but by their own weight and size seemed to be attached to it. Here the fixtures and fittings especially named in the bill of sale were entirely such as would come under the words of the Act as "personal chattels." If so, then the deed-poll under which they were now claimed, must, as to them, be void, for it was not registered, and not being registered the fixtures must be treated as continuing in the order and disposition of the tenant, as being capable of being assigned by him to a creditor, and as being subject to be taken and sold by that creditor. *Boyd* v. *Shorrock* (2), where a mortgage of a mill, held on lease, in which there were trade fixtures, was held to pass the fixtures without registration, cannot be supported. In *Holland* v. *Hodgson* (3) the mortgagor was the owner in fee, the fixtures consisted of machinery really affixed to the freehold, and were held to pass by the mortgage of the mill as part of the realty; the question there was in fact determined on those special circumstances. That case could not be applied to one where, as here, the mortgage was by a mere termor, and the fixtures were entirely of a temporary nature and use, which fixtures any tenant might at his pleasure disuse or remove. It cannot be said that, as a rule, what are called fixtures must be treated as absolutely incidental to the premises to which they are attached. Trade fixtures certainly are not so. In many cases their value might exceed the value of the premises themselves. This was recognised in *Begbie* v. *Fenwick* (4), where the Vice-Chancellor said: "For the purpose of my decision I am

(1) 2 K. & J. 536; 25 L. J. (Ch.) 361.
(2) Law Rep. 5 Eq. 72.
(3) Law Rep. 7 C. P. 328.
(4) Law Rep. 8 Ch. Ap. 1075, n.

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bound to say that, considering the enormous value of machinery for the purposes of trade, as, for instance, in a cotton mill, I entertain very considerable doubt whether a mere conveyance of the land or an assignment of the building for the residue of the term, with the appurtenances (nothing being said about the fixtures), would be sufficient to pass the fixtures." And in *Ex parte Daglish* (1) Lord Justice *James* said: "In the case of a freeholder he has exactly the same interest in everything attached to the freehold as he has in the bricks and mortar themselves which make up the walls of the freehold. But that is not the case with respect to a tenant who has a limited interest in the soil and the buildings—it does not signify what that limited interest is—and who has, besides, an absolute interest, a complete and unqualified property (unqualified except as to this, that he must remove them before the end of this term) in the fixtures as distinct from the interest in the land. This interest is a thing which he can part with, a thing which his creditors can seize, and a thing which is liable to execution as against him, just as much as the chairs and tables in his house." It is difficult to say how it happened that fixtures came to be treated as chattels real, as in *Poole's Case* (2), but the rule as there applied, though apparently followed, has been since considerably relaxed. Here there was no pretence to treat the fixtures claimed by the Respondent as chattels real—they were in truth pure personal chattels put up by the tenant for temporary use, subject to his will as to their use, and capable of removal by him. In *Hawtrey* v. *Butlin* (3) Mr. Justice *Blackburn*, after remarking that *Holland* v. *Hodgson* (4) and *Mather* v. *Fraser* (5) apply to the case of a mortgage in fee, says (6): "When a person has a limited interest in land, such as a term of years, and on the land there are fixtures in which he has an absolute property, and he mortgages his interest in the land by way of underlease, I should think that the property in the fixtures would not pass by the mortgage, and the right to sever them would still remain in the mortgagor, unless

(1) Law Rep. 8 Ch. Ap. 1080.
(2) 1 Salk. 368. See observations of Lord Chancellor *Westbury* in *Ex parte Gorely*, 4 De G. J. & S. 482–3.
(3) Law Rep. 8 Q. B. 290.
(4) Law Rep. 7 C. P. 328.
(5) 2 K. & J. 536; 25 L. J. (Ch.) 361.
(6) Law Rep. 8 Q. B. 293.

there is a clear intention, to be gathered from the terms of the mortgage deed, to convey the absolute interest in the fixtures as well as the limited interest in the land." There is no such intention manifested here, and therefore, as the learned Judge added, "the conveyance of the fixtures must be treated as a bill of sale of personal chattels, and would require registration." And then, referring to *Boyd* v. *Shorrock* (1), he declares that he prefers the decision in *Begbie* v. *Fenwick* (2), a preference which was also intimated by the other Judges of the Court. [LORD SELBORNE:—Is there any authority for the proposition that where the words of an interpretation clause refer to a particular matter, or to a particular state of things, they are to be construed as extending farther, and operating as if they constituted a general enactment on the whole subject matter of the statute?] The words here really have a general operation.

In *Richards* v. *James* (3) an observation was made in the judgment which appears unfavourable to this Respondent, but it was not necessary for the decision of that case, and may be treated as *obiter*. That case depended on its peculiar circumstances, and does not affect the present; it was merely a decision that one bill of sale which was registered had priority over another bill of sale which was not registered.

But even if the mortgage could be taken as operating upon the fixtures at the time it was made, that is, as passing the fixtures on the premises as they then stood, it cannot operate on those which have since been placed there, and no evidence has been given by the Appellants, upon whom, as to this matter, the burden of proof lies, to shew what were the original and what the new fixtures. All alike cannot be affected by the mortgage, and the mortgagee having failed to shew to which fixtures he was entitled, if he was really entitled to any, it must be considered that they all remained in the possession of the tenant, who has duly assigned them.

LORD CHELMSFORD:—

My Lords, when I read the judgment of the Master of the Rolls I certainly expected that the question which was to be

(1) Law Rep. 5 Eq. 72. (2) Law Rep. 8 Ch. Ap. 1075, n.
(3) Law Rep. 2 Q. B 285.

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determined by your Lordships was one of a very different description from that which has been presented. I thought that the Master of the Rolls had decided the case upon these grounds: that the deposit of the lease with *Meux & Co.* included the fixtures, that it was a bill of sale within the *Bills of Sale Act*, that it required registration, and that not having been registered, it was, therefore, not available against the claim of Mr. *Jacobs*, who had a bill of sale which was duly registered. But now it appears that the whole statement of the facts of the case was a mistake, that His Honour was not made acquainted with the real facts upon which the question was to be determined, and that his decision was founded upon an erroneous statement of facts, so that we are now called upon, on totally different grounds, to form an opinion as to whether the decree should stand.

It has been argued before your Lordships that the *Bills of Sale Act* having declared fixtures to be personal chattels, they are now to be deemed personal chattels for all purposes whatever, and that consequently, not being specially named, they did not pass under the deposit which was made to *Meux & Co.* But, my Lords, the *Bills of Sale Act* applies only to certain specified cases. It provides that where a bill of sale is made it must be registered, "otherwise such bill of sale shall, as against all assignees of the estate and effects of the person whose goods are comprised in such bill of sale, under the laws relating to bankruptcy or insolvency, or under any assignment for the benefit of the creditors of such person, and as against all sheriff's officers . . . be null and void." Fixtures under the interpretation clause are to be "personal chattels," but personal chattels in these particular cases only. It would be a most extraordinary conclusion for your Lordships to arrive at, that, because, for a particular purpose, that is to prevent frauds upon creditors, it is provided in the interpretation clause of an Act of Parliament that fixtures are to be deemed personal chattels, therefore they are made personal chattels to all intents and purposes, and that also, as between mortgagor and mortgagee, they are personal chattels, although certainly these persons are not within the terms of the Act.

Now, my Lords, it is admitted that unless the Act has this extensive application, the deposit of the lease carried with it the

fixtures; and, therefore, there really is nothing whatever to argue in this case. The case is perfectly clear. And, upon grounds totally different from those on which His Honour, the Master of the Rolls, decided it, we must come to the conclusion that his decree must be reversed.

LORD HATHERLEY:—

My Lords, the question that has arisen here for our decision arises under very singular, and, I must say, very unfortunate circumstances; because it appears that the decision of the Master of the Rolls, which we are called upon to review, was founded upon a state of circumstances present to his mind (as is obvious from the judgment he has delivered) totally different from the circumstances which really existed in the case. His Honour seems to have been of opinion, from some incorrect statement to him of the facts, that the instrument executed in favour of *Jacobs*, namely an assignment of certain fixtures in the public-house, had been duly registered under the statute, and that being so registered, that assignment was good as against the Appellants, who had obtained, but had not registered, a previous deposit of the lease (upon which I shall presently have an observation to make as regards the wording of a particular part of it), which deposit of the lease, beyond all doubt, as it seems to me, carried with it the same fixtures as are now in question between the Appellants and the Respondent, by virtue of the grant of the interest in the land to which those fixtures were attached.

Besides that, however, it appears, for some reason or other, not to have been called to His Honour's attention that the registration of the bill of sale of these fixtures was, as between the parties to this litigation, a circumstance which could not be in any way regarded, because these two parties were not placed in the position one towards the other upon which position alone the *Bills of Sale Act* would operate. It was not a question between a mortgagee and the general creditors represented by the assignee in bankruptcy, or between the assignee of the chattels in question by way of mortgage and an execution creditor, as between which classes of persons alone has the *Bills of Sale Act* apparently, on the face of it, any operation.

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Well, my Lords, that being so, the decision has evidently proceeded upon an entire misapprehension of the facts, which certainly was not owing to any want of acuteness on the part of the learned Judge, but to some mistake in the way in which the case was presented to his attention. However, the real facts are these: that the Appellant obtained a deposit of this lease of the public-house; that was accompanied by a memorandum, which states that the mortgagor has deposited this lease as security for £800, and not only for the sum of £800, but for all sums of money lent or paid "for insuring the premises, or the fixtures and fittings therein, against damage by fire." As to the general intention, therefore, of the parties, if the law had been silent, there can be no doubt whatever, because the form of the agreement assumes that an interest in the fixtures was intended to be created by means of this deposit; otherwise the person with whom the deposit was made, the mortgagee, could not have been entitled to insure those fixtures, and could not consequently have incurred any of that expense in insuring which is here secured by the memorandum of deposit.

But, my Lords, I put the case on a higher ground than inference of intention, because I apprehend it is too late, at this time of day, to contend that a regularly executed mortgage of a lease will not carry the fixtures of that property which is in lease, and of which the deeds are deposited. I apprehend that the reason for that is, not simply because the chattels are there in the house which has been so mortgaged, but because whilst attached to the land, although for the benefit of trade, the law has held that trade fixtures may be, at any time during the limited interest which the owner of the lease may have, removed by him, yet, if he do not remove them during the lease (as in the old case that was cited before *Holt* (1)), he is held to have allowed them to pass to the owner of the reversion, because, and only because, they are attached to his reversion; and if they are not removed, as the law would have enabled the person to remove them during the lease, they must be considered to have returned at once and finally to the owner of the reversion. The doctrine, therefore, was that they were a part of the land during the time they remained attached, but that, for the

(1) *Poole's Case*, 1 Salk. 368.

benefit of trade, they might, during the interest of that person who had only a partial interest in the land, be removed, so long as he had that interest, although there was no power whatever given to him for the purpose of removal, if he chose to allow the time to pass during which he might have removed them, and so far severed them from the property.

Upon that ground it is, without saying anything about an underlease, as we have not to consider that question now, I apprehend that a mortgage or assignment, out and out, of all a leaseholder's interest in the property itself, as distinguished from the fixtures, carries with it also the interest in the fixtures attached to the property, although those fixtures might be subject to the right of removal, if the mortgage had not been executed by the party entitled to the lease. I mention that because it appears to me to cover the question of any fixtures that may have been added subsequently to the memorandum of deposit by the mortgagor in this instance. If, subsequently to the memorandum of deposit he had attached other chattels to the property, the mortgagee of the lease stood in the same position as his mortgagor, and those things when attached to the freehold passed during the interest that still remained in the lease. Therefore the mortgage would attach to them, and the mortgagee would, at any time during the lease, have the benefit which his mortgagor had of removing those chattels that had been attached to the premises anterior to his mortgage, and also those that were subsequently attached thereto posterior to his mortgage.

That being so, my Lords, the only argument on this subject which we have heard to-day appears to me to be entirely untenable. It is this, that because the *Bills of Sale Act* says that, as regards a certain class of persons, it is necessary to enact that the trade fixtures shall be deemed to be "personal chattels," for the prevention of fraud—those persons being execution creditors or creditors under a bankruptcy—therefore they must be converted into personal chattels for every purpose whatever. That certainly seems to me to be the most illogical of arguments. The logical argument is entirely the other way. The Legislature found these things not personal chattels, and finding they were not personal chattels, said that for a certain limited purpose they should be

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deemed to be such. It does not go a step beyond that purpose; and when that purpose is answered it leaves them as they were found. They were found not to be personal chattels, but to be subject to the law I have referred to, which regulates them during the time they are attached to the property; and, therefore, so they remain, except in the specific case provided for by the Legislature; and so remaining, I apprehend, my Lords, there is nothing at all to be determined in this case.

The chattels, whether attached before or after the mortgage, have become part of the leasehold interest, in which the mortgagee has acquired an interest prior to the Respondent in this case; and in that state of circumstances it seems to me that, if the facts had been made clear to the Court below, it would have been evident that there was no question of law to be determined, and it is much to be regretted that the parties have been put to the expense of coming here.

LORD SELBORNE:—

My Lords, it is very clear, I think, that the Master of the Rolls would never have made the decree now under appeal but for a mistake as to a material fact, for which, as I understand from what has passed at the Bar of your Lordships' House, His Honour is not so much responsible as those who conducted the argument before him, who failed to make His Honour aware of the precise condition of the facts on the most material point, that is, as to the absence of registration in favour of either of the two competing titles.

My Lords, it has however been attempted to maintain the judgment upon the suggestion of a distinction between the effect, as to fixtures, of a mortgage in fee simple by a freeholder, and a mortgage, by way of assignment of a term, by a leaseholder. It is evident that for that distinction no authority can be cited, independent of certain *dicta* which occur only in cases which arose under the Act with reference to the registration of bills of sale. Numerous authorities before the passing of that Act had determined the effect of a mortgage, legal or equitable, by a termor as to fixtures upon demised land, to be precisely the same in favour of the mortgagee as if the mortgagor had been a freeholder, and the mortgage a mortgage in fee.

Another subsidiary point is really covered by the same decisions, namely, the suggestion that although fixtures which were upon the land at the date of the mortgage might pass, those which were placed upon it after the date of the mortgage would be in a different situation. As to that also, it is admitted that, at all events in cases of mortgages in fee, trade fixtures placed upon the land after the mortgage are so annexed to the land as to belong to the mortgagee. And if your Lordships do not recognise the primary distinction relied upon between the effect of a mortgage in fee and the effect of a mortgage by way of assignment of a term for any other purpose, I apprehend you cannot recognise it for that purpose, even if there be no authorities, precisely in point, as to the effect of a mortgage of a lease so far as relates to fixtures afterwards placed upon the land. My impression, not having heard any argument upon that point from the Appellants, is, that had it been necessary, authorities upon that point precisely to the purpose might have been produced. But, my Lords, the principle must be the same, and both these arguments therefore fail, unless that distinction can be made good which was attempted to be founded on the *Bills of Sale Registration Act.*

My Lords, I own it was with some degree of surprise that I heard the argument offered, that because the interpretation clause in the *Bills of Sale Registration Act* says, and only says, that the term "personal chattels" as used in that Act, shall be deemed to include fixtures—therefore, for other purposes than those of the Act, the general nature of fixtures with reference to the land to which they were affixed, was to be considered altered in law, and that in all dealings with those fixtures, whether inside or outside of the provisions of that particular Act of Parliament, the altered sense was to prevail. Even for the purpose of the Act of Parliament it appears to me that the interpretation clause does no more than say that where you find in the Act those words, "personal chattels," they shall, unless there be something repugnant in the context, or in the sense, include fixtures. What operation upon fixtures so covered by the expression "personal chattels" the Act may have, must depend upon its particular provisions, and that interpretation clause can have no influence whatever upon the present question, nor can anything else in that statute, if it be

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true, as seems admitted at the Bar, that this is not a case legislated for in any other way by that statute.

My Lords, it is very frankly admitted that in a case in the Court of Queen's Bench, in which a decision, which your Lordships are not in any way called upon to review or express an opinion upon, as to the effect of the *Registration Act* was given, the case of *Richards* v. *James* (1), decided in the year 1867, it was expressly laid down that, apart from the events of bankruptcy or execution, the *Bills of Sale Act* would have no operation whatever as against an unregistered assignment of fixtures. The circumstances of that case were these:—There were two persons who had assignments of certain trade fixtures belonging to a person who afterwards had an execution issued against his goods. The first assignee, *Spark*, had not registered his assignment, the second, *Hollingsworth*, had; the fixtures were taken in execution, but were recovered by *Hollingsworth*, the registered assignee, second in order of time, from the execution creditor. The Court of Queen's Bench held that as the first assignee could not have set up any title against the execution creditor, the title of *Hollingsworth*, which had prevailed by reason of registry against the execution creditor, was not to give way to the title of *Spark*—in other words, that *Hollingsworth* could retain against *Spark* what he had recovered, and what *Spark* could not have recovered, from the execution creditor. And what the Court said as to the position in which things would have stood had there been no execution was this: "Had it not been for *Hollingsworth's* subsequent registered bill of sale, the execution creditors would have been entitled to the proceeds of the goods seized. It is equally clear, on the other hand, that had there been no execution, and had the question been merely which of the two claimants was entitled to priority against the other, *Spark's* claim would have prevailed, because there is nothing in the Act which makes it necessary to register a bill of sale as against the holder of a subsequent bill of sale, whether the latter be registered or not."

My Lords, according to my recollection, which is imperfect, and possibly may be erroneous, in *Begbie* v. *Fenwick* (2) also, the mortgagor had become bankrupt before the question arose, and

(1) Law Rep. 2 Q. B. 285. (2) Law Rep. 8 Ch. Ap. 1075, n.

there being in that case a competition between a prior unregistered assignee and a subsequent registered assignee, if I am right in thinking that the additional fact occurred, of bankruptcy by the mortgagor, the case might be brought within the reach of the same principle with *Richards* v. *James* (1). And in the case of *Daglish*, before the Lords Justices, there had undoubtedly been a bankruptcy.

My Lords, whether those cases were correctly decided or not, is not the question before your Lordships. It may be an important question, and, for my own part, I think your Lordships would desire to abstain, upon this occasion, from expressing any opinion upon the subject, it not being necessary to do so. But in this case, when the facts are understood, there really appears to be no possible ground upon which the claim of the Plaintiffs could be resisted.

I apprehend that the form of your Lordships' judgment would probably be this, and I submit it accordingly for your Lordships' consideration. Reverse the decree of the Master of the Rolls, and declare that the Plaintiff is entitled to a decree for a perpetual injunction, according to the prayer of his bill, together with the costs of the suit, and with that declaration remit the cause to the Court below.

The following Order was afterwards entered upon the journals:—

> Ordered, That the decree of the Master of the Rolls of the 22nd of January, 1874, be reversed: And it is Declared, That the Plaintiffs (Appellants) are entitled to a decree for a perpetual injunction according to the first paragraph of the prayer of their bill, with the costs of the suit: And that, with this declaration, the cause be remitted to the Court of Chancery to do therein as shall be just, and consistent with this judgment and declaration.
>
> *Lords' Journals*, 2nd March, 1875.

Solicitors for the Appellant: *Hunter, Gwatkin, Hunter, & Clarke.*

Solicitor for the Respondent: *Thomas Angell.*

(1) Law Rep. 2 Q. B. 285.

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March 5, 9.

THE DIRECTORS, &c., OF THE SHROPSHIRE UNION RAILWAYS AND CANAL COMPANY } PLAINTIFFS IN ERROR;

AND

THE QUEEN, ON THE PROSECUTION OF EMMA SARAH ROBSON . . . . . } DEFENDANT IN ERROR.

Equitable Mortgagee—Railway Company—Certificates of Stock—Cestui que Trust—Trustee.

A certificate of shares is merely a solemn affirmation under the seal of the company that a certain amount of stock stands in the name of the individual mentioned in the certificate.

It is the duty of a person receiving, as an equitable mortgage of railway stock, the certificates of the shares thereof, to inquire what is the real position of the person pretending to mortgage it, for if such person has only the legal title by having the certificates in his possession, but is, in truth, merely the trustee for another, the equitable mortgagee will be unable to enforce his claim in opposition to the original *cestui que trust.*

Per THE LORD CHANCELLOR:—In order to take away a pre-existing equitable title, something tangible and distinct, having the strong and grave effect of producing such a result, must be clearly proved to have taken place. The burden of such proof lies on the person seeking to affect the previous equitable title.

H., a banker, was the banker of a railway company, he was also one of its directors. Under certain business arrangements of the company he was entrusted with the possession of certificates which represented shares, and those shares he held as trustee for the company; he converted the shares; the conversion was noticed; he gave an explanation, replaced the shares, and continued to hold the certificates as before, and stood on the register as the apparent owner of them. He borrowed money of *R.*, and deposited the certificates with *R.*, who held them for some time, and died without having taken any step to be registered as the owner of the shares. *R.'s* widow and executrix applied to be registered as the owner; her application was refused. She moved for a mandamus to compel registration, the Court of Queen's Bench refused the mandamus. The Exchequer Chamber reversed that decision, and ordered it to issue. On appeal to this House:—

Held, that this was the ordinary case of a trustee abusing his trust; that if *R.* had made proper inquiries he would have found that *H.* was only a trustee; that negligence sufficient to affect their equitable title could not be imputed to the directors and the company, and that, consequently, the equitable title of *R.* could not prevail against the earlier equitable title of the company.

Per THE LORD CHANCELLOR:—Whether a transfer of shares in a company can or cannot be made without the production of the certificates of the shares, is a matter entirely within the discretion of the directors.

IN this case Mrs. *Robson*, the holder of certain stock coupons or

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certificates of shares in the *Shropshire Union Railways and Canal Company*, had applied to the Court of Queen's Bench to issue a mandamus to the Plaintiffs in Error, commanding them to register her as the proprietor of these shares in the company, in pursuance of a deed of transfer executed in her favour by one *George Holyoake*. The Court of Queen's Bench had refused to issue the mandamus. On error to the Exchequer Chamber, the judgment of the Queen's Bench was reversed, and the rule for a peremptory mandamus was made absolute (1).

Christopher Robson, in his lifetime, had advanced on different occasions money to a considerable extent to *George Holyoake*, of *Neachley Hall*, in *Shropshire*, and had received from him a deposit of certificates of shares of the *Shropshire Union Railways and Canal Company* as security for payment. *Holyoake* had on the first occasion of deposit, which was on the 5th of April, 1866, given a memorandum in which he declared himself to be possessed "as of my own property and unincumbered," of the shares, the numbers of which and their several values he fully set forth. In the same memorandum were these words: "I hereby undertake and promise, on request, to execute a legal mortgage of the said shares, and such mortgage deed is to contain a power of sale, and all usual and customary covenants," &c. There were other memorandums of a like sort afterwards given upon occasion of other advances of money. No legal mortgage or transfer of the shares was ever given during the life of Mr. *Robson*, but the certificates of shares remained in his possession up to and at the time of his death, which happened on the 6th of May, 1867. By his will he appointed his wife sole executrix. All these shares had, with others, been, in fact, put into the hands of *Holyoake*, and registered in his name in the books of the railway company in the character of a trustee for the company, and not in virtue of any title to them belonging to him as an individual.

On the 12th of February, 1869, Mr. *Pulbrook*, the solicitor of Mrs. *Robson*, wrote to Mr. *Wragge*, the secretary of the railway company, a letter, in which he said, "My client is possessed, by virtue of a mortgage, of the following stock in your railway,

(1) Law Rep. 8 Q. B. 420, where the facts are fully set forth.

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amounting to £3712 10*s.*, standing in your books in the name of *G. Holyoake*, coupons [certificates] of which are in my possession. Will you please inform me what dividends are standing at the present time unpaid on such stock, as my client is about taking proceedings to have the stock reduced into possession. I observe in the note of the certificate, you state that the stock coupons must be surrendered before any deed of transfer can be registered. Will you please inform me if there is a provision to that effect in any of your special Acts of Parliament, or any bye-law sanctioning it. If so, will you give me the particulars thereof?" The directors answered this application by a letter of Mr. *Wragge*, dated the 13th of February, 1869, in which he said, "I am much surprised to hear that Mr. *Holyoake* can have mortgaged the stock in question, which he certainly could have no right to do, as the stock stands in Mr. *Holyoake's* name merely as a trustee." Some communications then took place with *Holyoake*, who, on the 5th of May, 1869, executed a deed of transfer, which, reciting the agreement to transfer, went on thus, "I do hereby bargain, sell, assign, and transfer to *Emma Sarah Robson*, executrix under the will of the said *Christopher Robson*, the sum of £3712 10*s.* Consolidated Stock, 1854, of and in the undertaking called '*The Shropshire Union Railways and Canal Company*,' and all accruing and accrued dividends, profits, and advantages thereof. To hold to her and her executors, &c., subject to the several conditions on which I hold the same immediately before the execution hereof." And Mrs. *Robson* duly accepted the same on those conditions.

On the 20th of May, 1869, this deed of transfer was delivered to the secretary of the company, with a demand that it should be registered, and that Mrs. *Robson* should be registered as the proprietor of the stock; which demand was refused, the directors asserting that the stock was their property, and that the deed was void as against them (1).

The application to the Court of Queen's Bench was then made. To the rule to shew cause the Defendants made a return setting forth that the stock and every part thereof was "registered in the

(1) It was admitted that the deed of transfer, being executed after notice, could not be relied on as giving any additional force to the original deposit of the shares.

name of the said *George Holyoake*, who in respect thereof is a trustee on behalf of" the said company.

The facts were put into the form of a special case, which, among other things, stated that in 1846 there were ninety-nine shares of the company, of the value of £37 10*s.* each, registered in the names of the late Earl *Powis* and of Mr. *Holyoake*, both of whom were directors of the company, and the register expressly stated that they were held by the Earl and *Holyoake* "as trustees for the company." The Earl died. The register continued unaltered until 1854, when the shares were converted into £3712 10*s.* consolidated stock, which was registered in the names of the Earl and of *Holyoake*. The entry on the register was in this form :—

"Dr. The Right Hon. the Earl of *Powis* and *George Holyoake*.

1869 Dec. 31	To Stock transferred...	1128	£ 3712	*s.* 10	*d.* 0	1854 Sep. 14	By Shares cons. ...	1294	£ 3712	*s.* 10	*d.* 0"

Certain transactions had taken place between the *Shropshire Union Company* and the *London and North Western Company*, and in the 7th clause of an agreement between the two companies *Holyoake* was spoken of as holding this stock as a trustee for the *Shropshire Union Company*. The register itself did not mention the word "trustee." For certain purposes of business arrangement *Holyoake* transferred this stock, in December, 1859, to a Mr. *Tootal*, who in December, 1860, retransferred it to *George Holyoake* and *Lyttelton Robert Holyoake*. In 1861 attention was called to the fact that, without the knowledge or consent of the company, £3000 of the said trust stock had been converted and sold; and the present Earl *Powis*, then chairman of the *Shropshire Union Company*, made a communication to *Holyoake* on the subject. Some correspondence occurred. *Holyoake* wrote to say that this particular stock had been converted in consequence of its having been mixed up with his own, and that he would take steps to replace it. It was replaced, and the case stated that "from that time *Holyoake* has held as trustee in trust for the said *Shropshire Union Railways and Canal Company*, and in no other capacity whatever," and the dividends were invested from time to time in the names of the chairman, &c., of the company.

The application for a mandamus was refused by the Court of Queen's Bench. That decision was reversed in the Exchequer

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Chamber, and a peremptory mandamus ordered to issue. This proceeding in Error was then brought.

Mr. *Cotton*, Q.C., and Mr. *McIntyre*, Q.C. (Mr. *W. P. Jolliffe* with them), for the Plaintiffs in Error :—

There was no title whatever in Mrs. *Robson* which she could ask a Court to enforce in her favour. The certificates were not in any way the property of *Holyoake*, he held them only as a trustee, and his fraudulent act could give no title whatever to a property in them. This case was in effect a repetition of the case of *Cory* v. *Eyre* (1), and must be governed by it. There the trustee had appeared to give a title to another person in opposition to that of his *cestui que trust*, but, upon the ground that this had been done secretly and fraudulently, it was held that the position of the *cestui que trust* had not been altered, and he, having received no intimation of a fraud being committed upon him, was held to be freed from any liability to make inquiry. In *Rice* v. *Rice* (2) the possessor of the deeds was held entitled to priority, but in that case the equities were equal, and the fact of the possession of the deeds was held to turn the scale in favour of the equitable mortgagee as against the vendor of the estate; and in that case, too, there had not been any fraudulent disposition of the property by a person not entitled to it, for at the time *Michael Rice* deposited the deeds with the mortgagee he held possession of them under a rightful and lawful delivery to himself. Here that was not so; at no time whatever was the possession of *Holyoake* anything more than the possession of a mere trustee. So again, *Re Bahia and San Francisco Railway Company* (3) did not apply, for there the person who had purchased the shares had purchased them on the faith of the certificates given by the company, and whatever remedy the company might have against other persons, it was held bound to make good its own representations, on the faith of which the purchaser had acted. In *Waldron* v. *Sloper* (4) there had been gross negligence on the part of the Plaintiff, and by that negligence he had enabled one *Matthews* to commit a fraud upon an innocent mortgagee, and his priority was consequently post-

(1) 1 De G. J. & S. 149.
(2) 2 Drew. 73; 23 L. J. (Ch.) 289.
(3) Law Rep. 3 Q. B. 584.
(4) 1 Drew. 193.

poned. So in *Layard* v. *Maud* (1) the right of the first mortgagee was postponed to that of the second on account of negligence. But these were cases of mere questions of priority, and could not affect the present, which was not a question of priority between two rights equally good in their origin, but a question of destroying one right by fraud and creating another by the same fraud. In *Allen* v. *Knight* (2), as in this case, the legal estate was conveyed after express notice of the rights of other parties, and it was held not to affect in any manner the decision of their relative claims. *Mumford* v. *Stohwasser* (3) is to the same effect, and the case is all the stronger because there it was a contest between two parties, each of whom had a valid title to the claim he set up. *Manningford* v. *Toleman* (4) does not apply here, for in that case there was, in the marriage settlement, an express trust by which the husband was, as Vice-Chancellor *Knight Bruce* said, "as much a trustee as if he had formally and regularly executed a declaration of trust;" and there was also a covenant by him, and the deposit of the title deeds was made in direct contravention of both. Nothing of that sort exists here. There was nothing whatever to give any title to *Holyoake* to treat these certificates as his own property, or to deposit them with *Robson* as security for his personal debts. Every act he did was not merely without lawful authority, but was in fraudulent violation of his duty, and the fraudulent deposit of the certificates could not afterwards be made valid by any formally executed transfer, and most especially so after the transferee had received due and distinct notice that *Holyoake* merely held the certificates as a trustee for the directors.

When *Robson* advanced these moneys he ought to have made inquiries, and then he would have learnt that *Holyoake* was a mere trustee; instead of which *Robson* not only made no inquiries, but, after he had received the certificates, took no steps whatever to perfect his title by registration. Yet registration alone could give a perfect title; and if *Robson* had applied to get himself registered, he would have been told at once what were the real facts of the case.

(1) Law Rep. 4 Eq. 397.
(2) 5 Hare, 272; 15 L. J. (Ch.) 430.
(3) Law Rep. 18 Eq. 556.
(4) 1 Coll. Ch. 670; 14 L. J. (Ch.) 160.

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Mr. *Southgate*, Q.C., and Mr. *Brooksbank* (Mr. *Eyre Lloyd* was with them), for the Respondent:—

Whatever rights may be claimed by a *cestui que trust* as against his trustee, or even as against parties with whom that trustee has dealt, they may be forfeited by his own conduct. Equity will not favour a person who has led to the compromise of the rights of another, and an innocent, party by his own negligence. But when the conduct that has led to that result is not merely negligent, but negligent after notice and full knowledge, and is therefore, in the consideration of equity, wilful negligence, there can be no claim to favour. Here *Robson* was entirely an innocent party; he saw the certificates in *Holyoake's* possession, he advanced his money, and received these certificates as security for payment, believing, as he had a right to do, that the person who had the possession of them was the person legally and beneficially entitled to them. They are what title deeds are, and the manual possession of them indicates in the eyes of the world the right and title to possess them. The Plaintiffs in Error could set up no such ground of title to the favour of a Court of Equity as existed on the part of Mr. *Robson*. They knew that on a previous occasion *Holyoake* had dealt in an unwarrantable manner with their shares, and therefore, when they afterwards trusted him, they did so at their peril. The transaction was set forth in the special case itself, and on that occasion he had been obliged to replace the stock which he had wrongfully transferred. That transaction ought to have put the Plaintiffs in Error on their guard; and, after it, they could no longer pretend that they had an implicit trust in *Holyoake*, or were, so far as he was concerned, *cestuis que trust* without notice or warning. They had had warning that he could and would abuse a trust confided in him. The case, therefore, fell within the principle of *Waldron* v. *Sloper* (1), where something much less strong than trusting a person who had previously abused his trust, namely, the loan of deeds for an unnecessarily long time, was held to make the person lending them liable, as between himself and an innocent mortgagee, to suffer the consequences of his negligence. So in *Hunter* v. *Walters* (2), two mortgagees of an estate

(1) 1 Drew. 193.

(2) Law Rep. 11 Eq. 292; Law Rep. 7 Ch. App. 75.

left the deeds in the hands of *Walters*, a solicitor, and afterwards, at his request, and in implicit confidence in him (for they had not had any warning of his misconduct), and in total ignorance of the real meaning of what they were doing, signed and indorsed a receipt for purchase-money, all of which things put *Walters* in the position of a purchaser, and he immediately mortgaged the property to one *Curling;* it was there held that the two mortgagees, who had thus negligently, though without any ground for suspicion, allowed themselves to be made the means by which an innocent person was defrauded, must be postponed to *Curling*, who had advanced his money innocently upon a security which appeared to be valuable. *Baillie* v. *McKewan* (1) was a case where the *cestuis que trust* had no reason for suspecting their trustee, while here there was not only ground for suspicion, but actual knowledge of misconduct, and yet he was again trusted with the means of repeating his misconduct. Surely that disabled those who so acted from obtaining an advantage over persons whom they had thus exposed to his frauds. *Cory* v. *Eyre* (2) is not, when rightly considered, an authority against the Respondent, for there the mortgagee who had the first title had done nothing whatever which ought to subject him to lose his priority; he had merely assumed, as men in general are, in ordinary circumstances, entitled to assume, that his trustee would not act dishonestly; and that point was much insisted on in the judgment of Lord Justice *Turner* (3). Here the Defendants, constituting a company, were less entitled to favourable consideration than an individual would be; they allowed *Holyoake* to continue in possession of the means to commit a fraud, and by their own regulations, which, like those of other companies, declined to admit trustees, as such, upon their registers, they precluded the possibility of any one discovering that shares registered in their books did not actually belong to those whose names were on the register. In *Hunter* v. *Walters* (4) Lord Justice *James* clearly expressed the principle that ought to be applied to cases like the present, he said (5): "I am of opinion that the rule of equity is the rule of common sense, and that the

(1) 35 Beav. 177.
(2) 1 De G. J. & S. 149.
(3) 1 De G. J. & S. 169.
(4) Law Rep. 7 Ch. App. 75.
(5) Law Rep. 7 Ch. App. 85.

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principal must suffer for the fraud of his agent, and not the stranger who is dealing with the agent; that the man who has made the representations, under whatever circumstances, must bear the consequences of those representations, and not the man who has trusted to the representations so made." Here *Holyoake* was an agent making representations to a stranger, and it was by the culpable negligence of the Appellants that he was enabled to make them successfully. Applying that principle to the facts of this case, the directors must suffer for the acts of their agent; the directors having, after full notice, left him, and left him alone, not even taking the precaution of associating another trustee with him, in possession of the means of doing again what he had done once before, abuse the power confided to him. On the other hand, Mrs. *Robson*, the executrix, had not been guilty of any omission, as Mr. Baron *Cleasby* expressly declared in the judgment in the Court below (1). Every principle was therefore in her favour, while it was evident that the directors had most negligently allowed *Holyoake*, unchecked and unwatched, to retain the means of committing a fraud.

Mr. *Cotton* replied.

THE LORD CHANCELLOR (Lord *Cairns*):—

My Lords, if it were not for the very sincere respect which I entertain for the unanimous opinion of the learned Judges of the Court of Exchequer Chamber, I should have thought that this case was an extremely simple one, and that if it had fallen to be decided in one of the Courts of Equity, to whose administration the subject-matter more properly belongs, it could hardly have admitted of any serious argument.

My Lords, the prosecutor of the mandamus in this case was Mrs. *Robson*, the widow of one *Christopher Robson*. She came before the Court of Queen's Bench for the purpose of obtaining a mandamus to order the directors of the *Shropshire Union Railways and Canal Company* to transfer, in their books, into her own name, a sum of £3712 10s. of their consolidated stock of 1854, which was then standing in the name of *George Holyoake*. She came with an

(1) Law Rep. 8 Q. B. 444.

instrument of transfer under the seal of *Holyoake*, executed on the 5th of May, 1869; but that instrument of transfer was not executed until after notice had been given to her of the infirmity of her previous title. It is very properly admitted on both sides that the case must be dealt with as if it had fallen to be decided before that document had been executed.

Looking at the case as it stood before that document was executed, the facts which are clearly to be borne in mind are these: *George Holyoake* had standing in his own name (for I disregard the history of the period during which another name was associated with his) stock of the company to the value of £3712 10*s*. Undoubtedly he held that stock as trustee for the Defendants, and in no other character. The special case states that this stock was in his name in the year 1863, from which time he has held it "as trustee in trust for the *Shropshire Union Railways and Canal Company*, and in no other capacity whatsoever, and thenceforth from time to time all the dividends which have become payable on the stock were invested in the names of the chairman of the company and other directors thereof, who have held the same as trustees for the company."

It was perfectly legitimate that these Defendants should own the stock. It is perfectly in accordance with law that they should have had that stock, which they could not hold in their own names, standing for them in the name of a trustee or in the names of trustees, and in that state of things undoubtedly the position of matters was, that the Defendants had the whole beneficial interest in the stock belonging to and forming part of the property of the company. Theirs was the equitable title. *Holyoake* was a person who held merely the legal title and the right to transfer the stock. He was able, if not interfered with, to transfer the stock to any other person, and to give a valid receipt for the purchase-money to any person who had not notice of the beneficial interest of the Defendants. On the other hand, any person with whom *Holyoake* might deal by virtue of his title upon the register, had, or ought to have had, these considerations present to his mind. He ought to have known that although *Holyoake's* name appeared upon the register as the owner of these shares, and although *Holyoake* could present to him the certificates of this

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ownership, still it was perfectly possible either that these shares were the beneficial property of *Holyoake* himself, or that they were the property of some other person. If he dealt merely by equitable transfer, or equitable assignment with *Holyoake*, and if it turned out that the beneficial ownership of *Holyoake* was co-incident and co-extensive with his legal title, well and good; his right would be accordingly, so far as *Holyoake* was concerned, complete. But if, on the other hand, it should turn out that *Holyoake's* beneficial interest was either *nil*, or was not co-extensive with the whole of his apparent legal title, then I say any person dealing with *Holyoake*, by way of equitable bargain or contract, should have known that he could only obtain a title which was imperfect, and would not bind the real beneficial owner. And, my Lords, he also might have known, and should have known, this, that if he desired to perfect his title, and make it entirely secure, he had the most simple means open to him—he had only to take *Holyoake* at his word. If *Holyoake* represented that he was the real owner of these shares, the proposed transferee had only to go with *Holyoake*, or to go with the authority of *Holyoake* in his possession, to the company, and to require a transfer of those shares from the name of *Holyoake* into his own name. If he had obtained that transfer, and the company had made it, no question could have arisen, and no litigation could subsequently have taken place.

That being the state of things, your Lordships have on the one hand the directors clearly the equitable owners of the stock in question. You have, on the other hand, Mr. *Robson*, the person dealing with Mr. *Holyoake* for an equitable charge, having in his power, if he was so minded, to obtain a perfectly valid legal charge, which would have made his title complete. Your Lordships have to deal with a case of a pre-existing and undoubted equitable title, and circumstances which are alleged to have defeated and to have taken away that pre-existing equitable title. My Lords, that pre-existing equitable title may be defeated by a supervening legal title obtained by transfer. And I agree with what has been contended, that it may also be defeated by conduct, by representations, by misstatements of a character which would operate and enure to forfeit and to take away the pre-existing equitable title.

But I conceive it to be clear and undoubted law, and law the enforcement of which is required for the safety of mankind, that, in order to take away any pre-existing admitted equitable title, that which is relied upon for such a purpose must be shewn and proved by those upon whom the burden to shew and prove it lies, and that it must amount to something tangible and distinct, something which can have the grave and strong effect to accomplish the purpose for which it is said to have been produced.

I have anxiously striven to understand what were the circumstances or what was the line of conduct which is said in this case to operate to defeat the admitted equitable title, and I have been able to discover only four matters which are stated either separately or all together to have produced that effect.

My Lords, in the first place, the arguments at your Lordships' Bar on behalf of the Respondent appeared to me to go almost to this, that whenever you have an equitable owner who is the absolute owner, that is to say, entitled to the whole equitable interest, such a person ought not to have a trustee at all holding the *indicia* of legal ownership; or, if he chooses, for his own purpose, to have such a trustee, he must be in danger of suffering for every act of improper conduct by that trustee; and that therefore, if the person entitled absolutely to the equitable interest in a share in a railway company, chooses for his own purpose to have that share standing in the name of a trustee for him, he will be bound not merely by a valid legal transfer of that share by the trustee, but by any equitable dealing or contract which the trustee may choose to enter into. My Lords, that is a very serious proposition, It goes not merely to shares, but it goes to land, and to every other species of property; and it goes to say that, whereas there is a large, well-known, recognised, and admitted system of trusts in this country, that system of trusts is to be cut down and moulded and reduced to this, that it is to be a system applicable only to infants, married women, or persons with limited interests; and that wherever the limited interest has ceased, and the equitable interest has become entire and complete without any limit, there the equitable owner is under some measure of obligation with regard to his duty of watching his trustee, an obligation which does not lie upon a limited owner. I find no authority for such a

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proposition, and I feel satisfied that your Lordships will not be disposed to introduce, for the first time, that as a rule of law.

What was the next circumstance founded upon? It was this, that the equitable owners, the directors, allowed this stock to stand in one name only. My Lords, is the doctrine now to be introduced for the first time, that a *cestui que trust* who has one trustee only is to be bound to exercise a greater amount of vigilance or to take farther precautions than he would have to take if he had two or three trustees? What, then, is to be said to the case of there being two or three trustees, and one becoming the survivor? Is there, then, to be a fresh duty cast upon the *cestui que trust* which, if he does not perform, he is to be in some danger from the act of that one trustee, and in some way to be responsible for that act for which he would not be responsible if there had been more trustees than one? I know of no authority for that proposition, and I think your Lordships will not be prepared to introduce now for the first time that new rule of law.

What, my Lords, was the next circumstance that was founded upon? It was this, that this one trustee had previously committed a breach of trust, and that the breach of trust had been condoned by the *cestuis que trust.* No doubt that which was in the eye of any Court a breach of trust had been committed. It had been observed by the *cestuis que trust,* and the attention of the trustee had been called to it. He gave to the *cestuis que trust* a reason, which your Lordships may think to have been satisfactory or unsatisfactory, but which in point of fact was accepted by the *cestuis que trust.* Their confidence in the trustee does not appear to have been shaken; they evinced that confidence by allowing him to replace the stock in his sole name, and to have it in his sole name. They could have had no sinister or improper object in that, and they gave by that the strongest proof that they were satisfied that their trustee ought not to be held to have forfeited their confidence. But, my Lords, I repeat that here again is a suggestion that a new rule, entirely unknown in Courts of Equity, so far as I am aware, should be introduced, namely, that persons claiming by a subsequent equitable title are to be allowed to displace a previous equitable title by entering upon a review of the previous conduct of the trustee who has created, or attempted to create, a second

equitable title, and if they can find any previous misconduct by him, to found upon that previous misconduct some claim to displace the previous equitable title.

Then, my Lords, in the fourth place, this circumstance was relied upon, that the *cestuis que trust* had allowed the trustee to have possession of the certificates of the shares. Now a certificate of the shares or stock of a railway company is merely a solemn affirmation under the seal of the company that a certain amount of shares or stock stands in the name of the individual mentioned in the certificate. Undoubtedly the stock did stand in the name of Mr. *Holyoake*. If I am right, the directors were justified in having it in his name, and they were also justified in giving him the certificates, which did no more than tell that which any person would have found out by looking at their books, namely, that the stock stood in his name. It is said that there was some complete protection in the possession of the certificates, so that if the holder passed them over to another person that other person would think he obtained a good title because no transfer could be permitted without the production of the certificates. But, my Lords, whether a transfer should be permitted or not under those circumstances would be entirely within the discretion of the directors. They were not bound to permit a transfer without the production of the certificates, but, though not bound to permit a transfer, I apprehend they would not be in any way answerable if the transfer should be in any case made without the production of the certificates of the shares.

Therefore, my Lords, if we are to proceed, as your Lordships will proceed, upon the well-established system of trusts prevailing in this country, I cannot find that there was anything done by the *cestuis que trust* in this case which ought to forfeit and displace that equitable title of which, as I began by saying, they were clearly possessed.

The case would be entirely different if any misstatement had been made by the directors, if anything had been said by them to Mr. *Robson*, or if anything had been placed by them on the face of any document stating something which was not the truth, upon the faith of which Mr. *Robson* might have acted. That was the question which came before the Court in the case of *Rice* v.

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Rice (1), referred to at your Lordships' Bar, and which appears to have been an authority acted upon by the Court of Exchequer Chamber. There a vendor, who unquestionably would have been held to have, in the eye of the Court of Equity, a lien for his purchase-money, for some purpose indorsed upon the deed a receipt for that purchase-money, stating that it had been paid. That was just the same thing as if he had stated that he had not a lien, or that he did not wish to insist upon a lien for the purchase-money, and it would have been contrary to the first principles of equity, and, indeed, of common sense, to say that, after that deed had been given by him to the purchaser, and the purchaser armed with that deed had created an interest in some third party on the faith of that statement, the vendor could subsequently come forward, and, as against that third party, claim to be put in possession of that lien which by the indorsement of that receipt he had virtually surrendered.

My Lords, the case of *Waldron* v. *Sloper* (2), which was decided by the same learned Judge, is a case also entirely separate and distinct from the present. There the incumbrancer, who had no interest whatever as a mortgagee, except by the delivery to him and the retainer by him of the title deeds of the property, chose to give up those title deeds. It is true that he gave them up upon an allegation that they were wanted for a temporary purpose, but in place of asking for them again, and of regaining the possession of them when that temporary purpose was satisfied, he allowed them to remain in the hands of the mortgagor for three or four years, and during that space of time, during which he was virtually leaving his security in the possession of another, that other by the possession of the title deeds was enabled to create a fresh equitable mortgage, which was held, in consequence of the laches of the first mortgagee, to have priority over the first.

My Lords, neither of those cases has, as it appears to me, any application to the present. The present appears to me to be simply the case of an ordinary trustee holding property of the kind in question for a *cestui que trust*, and an incumbrance created by the trustee, which can only carry to that fresh incumbrancer such interest as the trustee could give. The trustee could not

(1) 2 Drew. 73. (2) 1 Drew. 193.

give an interest as against his *cestui que trust*, and therefore it appears to me that the incumbrancer, now represented by the Plaintiff in the mandamus, is not entitled to have the transfer in the company's books of the stock in question.

I therefore submit to your Lordships, and move, that the decision of the Court of Exchequer Chamber should be reversed, and that the judgment on the motion for a mandamus should be entered for the Defendants.

LORD HATHERLEY :—

My Lords, I entirely concur in the decision at which you have been advised by the Lord Chancellor to arrive.

It appears to me that the question in this case is reduced to an extremely simple proposition when we read, as we do in the special case, that this property in question, namely, £3712 10*s.* stock, was held early in 1863 by *Holyoake* as a trustee for the Defendants, and that he so held it from that time until the transaction with *Robson* took place. About three years after the constitution of this trust, and whilst he was so in possession of the property as trustee, he affected to deal with it by giving *Robson* a security upon it. *Robson* must have known perfectly well, as all these persons dealing with this company knew, that the shares, although ostensibly standing in the names of the persons who had power to deal with them, and to transfer them, might (or might not, as the case might be) be held upon some trust. The only mode of making himself perfectly safe, therefore, was to obtain at least a transfer of the shares, and perhaps to go farther and obtain also registry. He was content not to do either of these things, and he trusted to the credit and integrity of *Holyoake*, who professed to deal with him as owner of the shares.

The case of *Cory* v. *Eyre* (1) appears to me to lay down very justly what the real principle is in these matters. In the eye of the Court of Equity the *cestuis que trust* (in this instance the Defendants) are the owners of the property. Has that owner's right been forfeited? Mr. *Robson* has not acquired that ownership because he has not obtained a transfer, and he has acquired

(1) 1 De G. J. & S. 149.

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nothing that could pass to him any equitable right, nor can he claim it on any ground as a consequence of the conduct of the company. It may be (and authorities have been cited before us for the purpose of shewing that it is so in *Robson's* case) that persons being real owners of an equitable interest may so conduct themselves as to hold out to third persons dealing with their trustee that they are not such equitable owners. Either they have parted with their interest, as in *Waldron* v. *Sloper* (1), where deeds had been parted with for four years, deeds that constituted in fact *Waldron's* only title; or it might be, as in the case of *Rice* v. *Rice* (2),—they may have represented that they had parted with their interest by signing a receipt for the purchase-money where their only interest was a lien on that purchase-money; or it might be in various other modes. The *Case of Attwood*, a case of a different description from this, is another instance of such a representation being made. In one manner or another they may have so represented that they have parted with their equitable right and interest as to make it impossible for them again to set up that right against a person who has acquired a contradictory right upon the faith of that assertion and that representation.

The only question one has to ask oneself in these cases is, what has been the conduct of the real owner in equity, the person who has possessed the interest? Has he forfeited his right? Nothing has been adduced to shew that he has done so in this case, but the two arguments with which the Lord Chancellor has dealt, the first of which is that the coupons (as they are called, but certificates would be a better name for them) had been delivered to Mr. *Holyoake*, the trustee. But he was the proper person to have possession of the certificates, he was the trustee of these shares, and he was registered as the owner of them. The certificate does not tell you anything more than the register itself told you. The register told you that he was owner, and the certificate tells you he is owner. The certificate tells you that he is on the register, and that he is on the register for a certain number of shares; that is apparent upon the face of the register itself; and the register itself is not obliged to disclose the trust.

(1) 1 Drew. 193. (2) 2 Drew. 73; 23 L. J. (Ch.) 289.

Then it is said if the company had kept the certificates *Holyoake* could not have parted with the shares; his possession of the certificate tells you that he was in the position of being able to part with the shares. But that is not the case. All it tells you is the negative proposition that he was not able to part with the shares without it, that is to say, he would have no right as against the company to insist on the company transferring the shares unless he produced the certificates. But that does not give a title to the person who takes the certificates. He knows what the title is which he ought to acquire if he wishes to buy the shares. His title will be acquired by obtaining, not a delivery of the certificates, but a transfer of the shares into his name by *Holyoake;* and perhaps also, but I think that has not been quite decided, it may be necessary that he should obtain a registry. Nothing of that kind is done by *Robson;* no representation is held out by the company to say that *Holyoake* is in any different position from any other person who may be on the register, and any one dealing with anybody on the register knows that that person may be a trustee. He knows that he cannot depend on the security of his title unless he has a representation made to him distinctly, not by the person dealing with him, who, of course, would be interested in making such a representation, but by the person who has the real interest in the shares, that that interest no longer exists. His only way of making himself safe is by finding out if the person whose name is on the register is a trustee, and getting from the person for whom he is a trustee a declaration that his interest has ceased, or else by acquiring the legal title, and so placing himself in a better position than those who are trying to rest upon the equitable title.

It appears to me, my Lords, that there is nothing in this transaction which can justify us in saying that the directors have parted with the interest in the shares. There is nothing to justify us in saying that the directors have made any misrepresentation whatever, or stated any fact which is not perfectly correct and true, so that their interest ought to be on that ground postponed to that of the Respondent. With all respect for the unanimous decision of the Court of Exchequer Chamber, I adhere to the view taken by the Court of Queen's Bench (where the Judges came

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unanimously to the opposite conclusion) as being the more correct view, and am of opinion that the decision of the Court of Exchequer Chamber ought to be reversed.

LORD O'HAGAN:—

My Lords, I am quite of the same opinion, and but for the conflict of judgment between the learned Judges in the Courts below I should have thought this a very clear and simple case. It concerns the effect of the action of a trustee who has the *indicia* of title in his hands and misuses them, in breach of his duty and for his own advantage. There is not, in my opinion, any ground for distinguishing between it and that very ordinary case, either upon authority or upon the facts before us.

We have here a net and naked question arising upon a conflict of equitable interests. It is not denied that *Holyoake* was a mere trustee for the directors, and they undoubtedly possessed the entire equitable interest in the shares. Thereupon the question arises, Is there anything in the circumstances of the case, has there been anything in the conduct of the parties, to take out of them the interest which was so vested in them? It appears to me, my Lords, that there is not. The question is, between their equitable interest and the equitable interest of Mr. *Robson*. He had nothing more than an equitable interest. It has been most properly conceded at the Bar that the formal deed of transfer cannot avail the Plaintiff, inasmuch as it was made after full notice of the breach of trust; and whatever legal estate, so to speak, was conveyed by it must have been taken subject to the antecedent equities of the Defendants. It could give the Plaintiff no priority; and, being so, we have merely to consider the question as between the two equitable interests.

Then how does the matter stand? What is the infirmity in the directors' title, or the impeachment of their conduct, which will take from them that which was clearly theirs before their trustee attempted to transfer it to another? Upon the cases, we must find in their proceedings something of misconduct, or fraud, or negligence, to justify the postponement of their claim; and I can discover nothing of the sort. Putting out of consideration the

irrelevant matter which has, I think, more or less obscured the argument on the real issue, what is the impropriety, the fraud, or the negligence, which is imputed to them? It is said that the certificates which were the *indicia* of property in the shares were given by the Defendants to their trustee, and that the possession of those certificates enabled him to accomplish a wrongful act, in relation to the Plaintiff, for which they ought to suffer. But I am unable to reach that conclusion. In the case of an individual *cestui que trust*, he is held warranted in reposing full confidence in the trustee to whom he commits a power which may be used to his own great detriment; and he is not blameful because to that trustee he gives possession of the *indicia* of property and the muniments of title, although they may be misemployed so as to injure others or himself. It has been urged that a different rule should be applied, as to trust estate belonging to a company—but the argument has not been sustained by authority; and I do not see why the principle which governs the case of the individual should not be held applicable to the case of the corporation.

My Lords, I quite agree with my noble and learned friends that if there had been anything of misrepresentation, or misdirection, or improper dealing in the case, or a change of position wrongfully wrought by any representation of the directors, it would have been our duty to make them responsible, and compel them, as far as possible, to abide by the representation, and fulfil any contract which it impliedly involved, so as to put the parties in the relations in which, but for that representation, they would have stood towards each other, and indemnify the person injured by the making of it. We are familiar with the principle adopted in the case of *Pickard* v. *Sears* (1) at law, and in many cases in equity to the same effect. But on the evidence I do not see that the Defendants made any representation which was not true, or improperly induced Mr. *Robson*, in any way, to change his position. Rather it was for Mr. *Robson* himself—as was urged at the Bar, and by my noble and learned friend who has just preceded me, seeing he must have known that the certificates might be attached by a trust, and, having full opportunity of getting information about

(1) 6 Ad. & E. 469.

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them—to go to the company, to state what he had agreed to do, and to ascertain the real position of affairs.

In this condition of things, I think that the Plaintiff has failed to make any case which would warrant us, on the ground of representation, or misrepresentation, of misconduct, or of negligence, or on any other ground, to deprive the Defendants of their proper priority; that they have not forfeited it by acting according to the ordinary and permitted usage of *cestuis que trust* in giving to their trustee the muniments of title and *indicia* of property; and that there is nothing in the case which should induce us to say that the equitable interest which, beyond all doubt, belonged to the directors was at any time or in any way taken out of them.

Therefore, my Lords, I approve the course suggested by my noble and learned friend, and think that the judgment of the Court of Exchequer Chamber ought to be reversed.

Judgment of the Court of Exchequer Chamber reversed; judgment on the mandamus entered for the Plaintiffs in Error; and the judgment in the Court of Queen's Bench, refusing the mandamus, affirmed.

Lords' Journals, 9th March, 1875.

Attorney for Plaintiffs in Error: *John Philpot.*
Attorney for Defendant in Error: *Anthony Pulbrook.*

THE DIRECTORS, &c., OF THE LANCASHIRE AND YORKSHIRE RAILWAY COMPANY . } PLAINTIFFS IN ERROR; 1875 March 18, 19.

AND

THOMAS GIDLOW . . . . . } DEFENDANT IN ERROR.

Railway—"Adequate and sufficient Load"—Special Services—Accommodation—Money had and received—Interest on Judgment.

A Railway Act (clause 66) gave the directors power to charge a sum for the conveyance of coal along the line, "including the tolls for the use of the railways and waggons, or trucks and locomotive power, and every expense incidental to such conveyance," which sum was to be a maximum sum, except in certain cases, the exception being thus expressed: "Except a reasonable sum for loading, covering, and unloading of goods, and delivery and collection, and any other services incidental to the business of a carrier, where such services, or any of them, are or is to be performed by the company." The services in respect of which the excepted charges were claimed to be made, were those of taking the waggons of a colliery owner from his own sidings and attaching them to the trains, or returning them from the line of the railway to the sidings of the colliery owner; and it was found in the special case, that whatever particular difficulty arose in this work was occasioned by the position of the points effecting the junction of the line with the sidings:—

Held, that these were not services which came within the meaning of the exception.

At some of the stations the colliery owner had been allowed to leave his coals on the ground adjoining the lines:—

Held, that this might have been made the subject of an agreement for payment for any advantage thus obtained by him, but did not come within the description of a "service" contained in the exception.

Another clause in the Act (clause 73) required that the company should at all times "provide sufficient locomotive power, when and as the same shall be required, and as soon as an adequate and sufficient load shall be in readiness, to convey all merchandise," &c. The directors required the colliery owner to furnish a declaration of his having ready fifteen waggons with a minimum load of four tons in each waggon, and gave orders not to forward his coals in a smaller number of waggons containing coals. While this restriction existed the coals of other owners were carried in smaller quantities. It was found in the case that the "regulation requiring fifteen waggons was an unreasonable requirement":—

Held, that this restriction was not warranted by the words of the section, and that the colliery owner having suffered in his business from such restriction, was entitled to damages on that account.

The colliery owner had paid several of these sums, which in his action he

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sought to recover as overcharges, but he had paid them under protest, and for the purpose of obtaining possession of his goods:—

Held, that his payment of them under such circumstances was not a fact which would disqualify him from recovering them in an action for money had and received.

The arbitrator had found upon this matter that the Plaintiff was entitled to "damages occasioned to the Plaintiff by reason of loss of customers":—

Held, that his finding was right.

And interest upon the judgment was declared to arise on account of the delay in execution occasioned by the proceedings in Error.

THERE had been, in May, 1873, a decision of this House in a contest between these parties. That decision turned on the construction of certain words introduced into the private Acts passed with reference to this company, and, being peculiar words, not before introduced into any private Act, and not likely to be again so employed, the case was not deemed to justify a report. As the litigation between these parties has continued, it may be as well to give now some reference to this previous case. The directors of the company in 1868 brought an action against Mr. *Gidlow*, to recover a sum of £673 from him for conveyance of his coal from his colliery, near *Hindley*, to *Wigan Junction*. He paid £76 into Court, and as to the rest pleaded never indebted, and a set-off, and as to the latter, he insisted that he had been subjected to overcharges. The alleged overcharges depended on the construction of certain words in two private Acts of the company, 9 & 10 Vict. c. ccxxxi., and 22 & 23 Vict. c. cx. The first of these Acts was made to authorize the amalgamation of the *North Union Railway Company* with the *Manchester and Leeds Railway Company*, the amalgamated company assuming the name of the *Lancashire and Yorkshire Railway Company*. The 8th section of that Act fixed the toll for the carriage of coal and slack at 1*d*. per ton per mile, but permitted a charge, in certain cases and circumstances, as for a distance of six miles, though in fact the distance traversed might be less than six miles. The second Act contained similar provisions, and the right to make the charge was insisted on. The Court of Exchequer Chamber had affirmed a judgment of the Court of Exchequer which disallowed this charge, and in the case brought up to this House from the Exchequer Chamber, the Lord Chancellor declared (1) that, "on

(1) W. N. May 24, 1873, p. 103.

the construction of the company's Acts, and on the facts proved, as the whole of the work performed was really performed on what must be considered as the company's own lines, and as the coals were sent on one journey, and were not to have that journey broken at an intermediate point, what was called the six mile clause in the Acts was not applicable." There had also been an allegation that special services were rendered by the company in bringing the Defendant's loaded coal trucks from his private sidings on to the company's lines of rail, and returning the Defendant's empty trucks from the company's lines of rail to the Defendant's private sidings. As to these alleged special services, their Lordships held "that they were only those which were inevitable to the business of the company, and without which that business could not be carried on, so that they could not be called special services." The judgment of the Court of Exchequer Chamber, which had been in favour of Mr. *Gidlow*, was therefore affirmed.

The present appeal in Error arose out of an action brought by Mr. *Gidlow*, in February, 1869, against the company to recover the alleged overcharges, and also to recover damages upon the ground that the company had injured his business by placing restrictions, not authorized by the company's Acts, on the conveyance of his coal along the line. The cause was tried before Mr. Justice *Brett*, at the *Liverpool* Spring Assizes, in 1869, when a verdict was taken for Mr. *Gidlow*, subject to a special case to be stated for the opinion of the Court. The case set forth all the material facts, and all the clauses of the Acts of the railway company on which the Court had to put a construction. Both the facts and the clauses are sufficiently referred to in the judgments. The Court of Exchequer gave judgment for Mr. *Gidlow*, and that judgment was affirmed in the Exchequer Chamber. The directors brought the case on Error to this House.

Mr. *Herschell*, Q.C., and Mr. *J. Edwards*, Q.C., were heard for the Plaintiffs in Error.

The *Solicitor-General* (Sir *John Holker*), and Mr. *J. Kay*, Q.C., for the Defendant in Error, were not called on.

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THE LORD CHANCELLOR (Lord *Cairns*) :—

My Lords, the action out of which this appeal arises was brought in the Court of Exchequer by a colliery owner of the name of *Gidlow* against the *Lancashire and Yorkshire Railway Company;* and, so far as it is necessary to advert to the details of the action, it may be stated to have been for the purpose of recovering, in the first place, certain overcharges which had been paid by Mr. *Gidlow* to the railway company as for the carriage of his coal, or for services rendered by the railway company with respect to it; and, in the next place, to recover from the railway company damages upon the ground that they had imposed certain restrictions on the conveyance of the coal along the line of railway, which, as carriers, and having regard to the provisions of the Act of Parliament incorporating them, they were not entitled to impose. My Lords, it will be found I think by your Lordships that these two matters can be dealt with in the smallest possible compass. I may observe that the Courts of Exchequer and of Exchequer Chamber were unanimous in their opinion that judgment ought to be given for the Plaintiff; and it is against these unanimous judgments that the railway company now appeals.

As regards the claim for the recovery of money paid to the railway company which there was not a lawful title to demand, the section which is material to be considered is the 66th section of the later Act incorporating the amalgamated company. That section lays down the maximum which the railway company is entitled to charge for the conveyance of goods, and it contains in it an exception which, in reading the section, I will for the moment pass over. Excluding the exception, the section runs thus:—"With respect to the conveyance of goods, the maximum rates of charge to be made by the *Lancashire and Yorkshire Railway Company* for the conveyance thereof along the said railways, including the tolls for the use of the railways, and waggons or trucks and locomotive power, and every expense incidental to such conveyance, shall not exceed the following sums (that is to say)," "for all coal and cannel," and so on, laying down the maximum.

The directors, as regards Mr. *Gidlow*, have demanded and have received from him a larger sum per ton than the maximum thus defined. Their justification, if there be a justification, for

demanding and receiving that sum must be found in that exception, which in reading the section I for a moment passed over, and the question is, whether they bring themselves within that exception. The exception giving them power to make a farther charge over and above the maximum runs in these words, "Except a reasonable sum for loading, covering, and unloading of goods, and for delivery and collection, and any other services incidental to the business of a carrier, where such services, or any of them, are or is to be performed by the company." The question is, have the directors of this company shewn that for any one of these excepted items they have done what will entitle them to make the farther charge to which I have referred?

Upon this point your Lordships have only to turn to the special case itself, where the facts which are material upon this head are to be found; and you will find in the 48th paragraph of the special case this statement:—"There were no services rendered to the Plaintiff at *Hindley* or *Wigan Junction*, or at any of the other stations along the Defendants' line of railway to which the Plaintiff sent his coals, beyond such as are the necessary and usual services when the company furnish the locomotive power, that is to say, when the waggons were to be taken from any particular station, taking the Plaintiff's waggons out of the sidings at that station and attaching them to the train, and when the waggons were to be left at any particular station, unhooking the said waggons and shunting them into the siding at that station, and if in performing the said services at *Hindley* any trouble or delay more than usual was occasioned to the Defendants, such additional trouble or delay was caused by the position of the points at the Defendants' said station at *Hindley*, or by the manner in which the junction of the Plaintiff's siding with the Defendants' line at the said station at *Hindley* was effected, and this siding with its said junction with the Defendants' line was, as hereinbefore appears, laid out and constructed under the superintendence of the Defendants' engineer. There was no agreement by the Plaintiff with the Defendants to pay for any special services."

My Lords, I read this statement as in the clearest terms negativing that which alone would have justified the railway company in their charge—negativing the performance of any service by the

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railway company which could come within that exception in the 66th clause which I have read. In truth, the only suggestion made in the argument before your Lordships was, that at one or more of the stations to which the coal was carried there had been a privilege given to the colliery owner of using a larger or smaller portion of the ground of the railway company for the purpose of leaving his coal upon the ground; and in the case of one particular station, an agreement or a license was shewn by which the colliery owner was permitted to leave his coals at and around a particular siding, and the company was not to be at liberty to take away that license from him except upon one month's notice. My Lords, that may or may not be a matter for which the company might have made an agreement, and required payment, but it undoubtedly is not a "service" performed by the company for the colliery owner. If a man lets to me an acre of land for the purpose of my placing my goods or minerals upon it, or if he gives me a license to place my goods or minerals upon a limited portion of his land or siding, that may be a matter for which he and I may enter into an agreement, and for which payment may be made; but it is not, within the Parliamentary power, to be termed a "*service* performed" by him for me. My Lords, that is the whole of the case as regards the first question; and I submit to your Lordships that upon this head the decision of the two Courts below was entirely justified.

My Lords, upon the other question—namely, the question as to the restrictions placed by the railway company upon the conveyance of the coals of the colliery owner—the clause of the Act of Parliament which has to be considered is the 73rd. That clause runs in these words:—"The company shall from time to time and at all times provide sufficient locomotive power, when, and as, the same shall be required, and as soon as an adequate and sufficient load shall be in readiness, to convey all merchandise, articles, empty waggons, matters, and things upon and along their railways." My Lords, in point of fact the railway directors have declined to carry coals of this colliery owner, Mr. *Gidlow*, unless on those occasions when he has made up and presented to them for carriage a number of waggons not less than fifteen, and he complains that, having from time to time waggons less than fifteen in

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number, but sufficient for a load, the company has refused to carry them (1).

The question, therefore, which your Lordships have to consider upon this part of the case is a question of fact—namely, is it or is it not the case, that when there was an adequate and sufficient load in readiness the railway company refused to accept that load and to carry it; in other words, is a load of fifteen waggons alone under the circumstances an "adequate and sufficient load" to be tendered to the railway company for carriage? Here, again, your Lordships have to turn to the findings in the special case upon matters of fact, and your Lordships will find that the 43rd paragraph is very material. But, before reading it, I had better read the earlier paragraphs. Paragraph 39 says:—"The Plaintiff's traffic was interfered with by the imposition of the said regulation requiring a train-load of at least fifteen waggons, and also the same prevented the plaintiff from sending away his coals frequently on the Saturday afternoon." Paragraph 40 says:—"The regulation requiring a train-load of fifteen waggons was also the cause of delay in forwarding of the Plaintiff's coal in consequence of the course of business adopted by the Defendants after the 13th day of June, 1866, which was as follows:—" and then that is described. Then the 41st paragraph says:—"The said regulation requiring fifteen waggons also caused delay in the forwarding of the Plaintiff's traffic, in this, that the trains conveying his waggons from *Hindley* through other junctions did not always reach those junctions in time to have such of his waggons as were intended for places beyond such junction attached to trains proceeding to those places," &c. In paragraph 42 it is stated:—"The said regulation requiring fifteen waggons also compelled the Plaintiff to hire additional waggons for the purpose of carrying on his business as a colliery proprietor." And then comes the 43rd paragraph:—"The said regulation requiring fifteen waggons was an unreasonable requirement, and was imposed by the Defendants upon the Plaintiff for the purpose of compelling him to pay the amounts which the Defendants alleged were due by him (the Plaintiff) to the Defendants on the monthly

(1) The case stated that on one occasion "he offered a declaration of nearly ninety tons of coals, contained in ten waggons, to be conveyed from *Hindley* to *Liverpool*," but that "the company's goods agent refused, saying that he could not accept less than fifteen waggons."

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accounts previous to the month of February, 1865, and while it was so imposed and enforced the Defendants were carrying the coals of other colliery owners in smaller quantities than fifteen waggons." My Lords, I do not place reliance upon these latter words, because it may be said that there may have been circumstances which were peculiar to the carriage for the other colliery owners, and which would not apply to the carriage required by Mr. *Gidlow*. But I take the earlier part of the paragraph as containing a clear and explicit statement that the regulation requiring fifteen waggons was an unreasonable requirement.

Now, having regard to the enactment in the Act of Parliament, that there is an obligation to provide locomotive power when required, and as soon as an adequate and sufficient load shall be in readiness, and taking in connection with that the statement I have read from the case, the case appears to me to state clearly and sufficiently that at a time when there was an adequate and sufficient load that adequate and sufficient load was refused, and it was that refusal which was "unreasonable" within the meaning of the finding of the arbitrator.

It was suggested (and this, indeed, was the only argument upon the point) that there was not an express finding by the arbitrator that the load was an adequate and sufficient load. But, my Lords, I think the finding is a still larger one. It does not take up the circumstance of each particular tender which was made, and affirm of that tender that there was an adequate and sufficient load tendered; but it states generally, and as applicable to the whole of the traffic from day to day, that the requirement that there should be not less than fifteen waggons was an "unreasonable requirement." I therefore submit to your Lordships that, upon this point also, the conclusion of the Courts below was entirely correct.

My Lords, there was a farther point argued, but somewhat faintly, namely, that the arbitrator in assessing the damages gave damages under one head, which could not be supported as a proper head of damage, it being admitted that as regards the *quantum* of damages that was not a question now to be considered, but was entirely in the power of the arbitrator. Now the first head under which damages were assessed by the arbitrator was this, "damages occasioned to the Plaintiff by reason of loss of customers, £2525"; a large sum, no doubt, but a sum with the

particulars of which we have nothing to do. My Lords, is it the case that the Plaintiff was not entitled, or might not be entitled, to damages by reason of loss of customers? My Lords, this case was put in argument, and it appears to me entirely to meet the point, and to suggest what may have been proved before the arbitrator. There may have been two or three collieries supplying with coal one of the towns or places mentioned in the case, *Hindley* for example, the owner of one of those collieries being Mr. *Gidlow*, and the other collieries belonging to other persons; the restrictions and impediments placed in the way of the carriage of coal for Mr. *Gidlow* may have been such as to supplant him in the supply of coals to that particular place, and to give the supply of coals virtually into the hands of his rivals or competitors in trade. That would clearly be a loss of customers, and the loss occasioned by that circumstance among others would be a head under which damages might be awarded. If the damages given by the arbitrator are given under a head under which they might have been awarded, that is quite sufficient to support the judgment.

I submit, therefore, to your Lordships that the judgments of the two Courts from which this case has come are entirely correct and ought to be affirmed. And, my Lords, I ought to add that my noble and learned friend, Lord *Hatherley*, who also heard the argument in this case, but who is prevented, I regret to say, by the death of a near relative from being present to-day, concurs entirely in the view I have now submitted to your Lordships.

LORD CHELMSFORD:—

My Lords, I entirely agree with my noble and learned friend, and consider that the questions which have been raised upon this appeal do not admit of any doubt whatever.

My Lords, the first question, as to what are called the terminal charges, depends, as my noble and learned friend has stated, upon the 66th section of the company's local Act. He has read that section, and I will not trouble your Lordships by reading it again. It is admitted on the part of the directors themselves that they are not entitled to charge anything "for loading, covering, and unloading of goods, and for delivery and collection." But they say they are entitled to a charge in respect of "services incidental to the business of a carrier." This charge is founded upon the

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accommodation which they gave to Mr. *Gidlow* of a siding at the *Bullfield* station. Now, I have had great difficulty in understanding how this arrangement between the directors and Mr. *Gidlow* can be a "service incidental to the business of a carrier." It is a mere licence or permission of a standing, if I may call it so, in the nature of warehouse room for his coals, and it appears to have been really a matter for the accommodation of both parties, because it is headed "Regulations to be observed in working the traffic from and to the coal sidings occupied by Mr. *Gidlow*." The directors had the complete command of those sidings for their own traffic and business, and the accommodation was to be put an end to upon a month's notice to be given by them. Now, really, as was observed in the course of the argument, this is not a "service incidental to the business of a carrier;" but the directors became, as it were, warehousemen, by reason of their permission of this standing. Therefore, my Lords, it appears to me that the claim of terminal charges in respect of these "services" wholly fails.

The other question is upon the restriction which the company imposed upon the Plaintiff of bringing a certain number of waggons containing his coals (a minimum of fifteen waggons, containing four tons each), and refusing, unless he did so, to carry his coals. The Defendants attempted to justify themselves by the 73rd section of the Act [see *ante*, p. 522]. The Defendants pleaded to the action brought to recover the money which was paid in respect of these charges, "that they did what is complained of *bonâ fide* and after notice to the Plaintiff, and solely with a view to the proper and efficient management and working of the traffic on their railway, and without undue or unreasonable prejudice, or disadvantage to the Plaintiff or his traffic, and without undue or unreasonable preference or advantage to or in favour of any other person, or company, or traffic."

My Lords, if this had been proved it might have raised a very important question as to whether the Defendants had a right to regulate their traffic in the way proposed, by imposing upon this colliery owner this necessity of sending fifteen waggons at a time. But the plea was so far from being proved, that it appears by the 43rd paragraph of the special case that it was found expressly that "The said regulation requiring fifteen waggons was an unreasonable requirement, and was imposed by the Defendants upon

the Plaintiff for the purpose of compelling him to pay the amounts which the Defendants alleged were due by him (the Plaintiff) to the Defendants on the monthly accounts previous to the month of February, 1865, and while it was so imposed and enforced the Defendants were carrying the coals of other colliery owners in smaller quantities than fifteen waggons." Therefore, the plea is not only not proved, but it is positively disproved, and it is of course found that the company could have no right to impose this restriction upon the Plaintiff, but that it was done with a sinister motive.

My Lords, there was a question raised here and argued, but, as my noble and learned friend said of another point, only faintly argued, that is, that the money for these terminal charges having been paid without objection, the Plaintiff had no right to bring an action to recover it back. Now there can be no doubt that where a person pays money which he is not bound to pay, with a full knowledge of the facts, he cannot recover it back in an action for money had and received. But there has always been an exception made in cases where a party has paid money under compulsion. It has been decided that where a carrier refused to deliver goods until a payment was made by the person to whom the goods belonged, amounting to more than the carrier had a right to charge, the customer might in an action for money had and received recover back the money so paid. There can be no doubt whatever that the Plaintiff here paid this money under *duresse;* he was compelled to do it, or his coals would not have been carried by the company; and, therefore, that is the answer to that argument.

With respect to the other question of the damages being too remote, I think my noble and learned friend has given a very satisfactory answer to that. The loss of customers was not a remote, but a direct and immediate consequence of the act of the company refusing to carry the coals.

Therefore, my Lords, I agree with my noble and learned friend that the judgment of the Exchequer Chamber ought to be affirmed, and the appeal dismissed with costs.

Judgment of the Court of Exchequer Chamber affirmed, with costs.

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Mr. *J. Kay*:—Will your Lordships permit me to say a word? I am instructed to apply for interest for the time that execution has been delayed by the proceedings in Error. In a previous case, which was argued before your Lordships' House, my learned friend, the Solicitor-General, applied to the Court from which the appeal came to this House, and the Judges refused to grant the interest because no order had been made by your Lordships' House on the subject. I find that it is laid down in *Archbold's* book on Practice, that the application must be made to your Lordships' House, and that "on a judgment affirmed in Error, it seems that the House of Lords gives interest from the day of its affirmance by the Exchequer Chamber, the rule being a rule of Trinity Term, 1833, viz.: 'On Error from one of the Superior Courts, such Court shall have power to allow interest for such time as execution has been delayed by the proceedings in Error for the delaying thereof; and the master on taxing,'" and so on. In the last case, the application was made, as I mentioned to your Lordships, by my learned friend, the Solicitor-General, to the Court below, but was there refused, on the ground that an application had not been made to your Lordships' House for it. I therefore make the application for it now.

THE LORD CHANCELLOR:—My Lords, it is inconvenient that questions of this kind should be raised after your Lordships' order has been made; but your Lordships would in this case perhaps look upon the application with more indulgence, inasmuch as the Counsel for the Plaintiff were not called upon. I apprehend, my Lords, that there can be no doubt upon this subject. It is, of course, right that interest should be given upon a judgment, and if there should be any difficulty about it (which I should have thought there was not) an order would be made for it. But I should have thought that it was almost, if not quite, a matter of course that orders, giving, upon a writ of error, judgment for the Defendant in Error carried (as they do the costs) the interest upon the judgment (1). I have no doubt that your Lordships will take care that the order will provide for that.

(1) 3 & 4 Will. 4, c. 42, s. 30. See, on the subject of the words of this section, *Burn* v. *Carvalho*, 1 Ad. & E. 895; and see also this case itself in the Court of Exchequer on the occasion of the application made, as above mentioned,

The following Order was afterwards entered on the Journals:—

"It appears to the Court of Parliament aforesaid, now here, that there is no error in the said judgment of the Court of Exchequer Chamber; therefore it is considered by the said Court of Parliament that the said judgment of the Court of Exchequer Chamber be affirmed, and stand in full force and effect. And it is farther considered by the same Court of Parliament now here, that the said *Thomas Gidlow* do recover against the said *Lancashire and Yorkshire Railway Company* £1426 0*s.* 6*d.*, by the same Court of Parliament aforesaid adjudged to the said *Thomas Gidlow*, and with his assent, according to the form of the statute in such case made and provided, for his costs, charges, and damages which he has sustained by reason of the delay of execution of the said judgment aforesaid, on pretext of prosecuting the said error suggested aforesaid in the Court of Parliament aforesaid; and thereupon the judgment roll aforesaid, and also the proceedings aforesaid had in the same Court of Parliament in the premises, are remitted by the same Court of Parliament to the Barons of the Exchequer, to the end that execution may be done thereupon, &c."

Lords' Journals, 19th May, 1875.

Attorneys for the Appellant: *Clarke, Woodcock, & Ryland.*

Attorneys for the Respondent: *Chester, Urquhart, Mayhew, & Holden.*

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and refused by the Court: *Lancashire and Yorkshire Railway Company* v. *Gidlow*, Law Rep. 9 Ex. 35. The Defendant there had only judgment for the costs of his defence. In the present case he, being Plaintiff, obtained damages for injury to his business.

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Feb. 11, 12, 13;
March 18.

PATTESON NICKALLS . . . . . APPELLANT;

AND

WILLIAM LUCAS MERRY . . . . . RESPONDENT.

Broker—Jobber—Rules of the Stock Exchange.

Post 818
2 C.L.D. 294
37, 600
4 C.L.D. 559.

A purchase or sale of shares made by one who is not a member of the *Stock Exchange*, and made through a broker who is a member of that body, will be treated as made subject to the rules of the *Stock Exchange*.

The rules of the *Stock Exchange* imply that the name of the person given as that of the ultimate purchaser of shares must be that of one able and willing to purchase; and they are not satisfied if the name given is that of a non-existent person, a lunatic, an infant, a married woman, or a person who has not given authority for the use of his name.

The contract of a jobber is to accept the shares, or to furnish the name of a person able and willing to accept them; and the time limited by the rules of the *Stock Exchange* for the approval or rejection of the name of the ultimate purchaser applies only to the responsibility, and not to the personal capacity and willingness of the person whose name is given.

If therefore the name given is that of one who had no legal capacity to accept the shares, though the time limited is allowed to go by without objection to him, the original contractor, the jobber, will remain liable.

M., not a member of the *Stock Exchange*, directed his broker to sell certain shares of a company, and the broker sold them to a jobber, who, according to the known practice on the *Stock Exchange* sold them again (and in a similar way they passed through several hands), and the jobber (without fraud) received from his purchaser, and passed on to *M.*'s broker the name (that of *L.*) as the name of an ultimate purchaser; *M.* executed a transfer to *L.*, and received payment for the shares; *L.* turned out to be a minor legally incapable of accepting the shares; *M.*'s name (though without his knowledge) remained on the registry of the company; *L.* did not pay the subsequent calls, and *M.* was required to pay them:—

Held, that the jobber was liable to make good to *M.* the calls which he had been compelled to pay on *L.*'s default.

Rennie v. *Morris* (1) disapproved.

THIS was an appeal against a decision of the Lords Justices, who had reversed an order of Vice-Chancellor *Bacon* by which order a bill filed by *Merry* against *Nickalls* had been dismissed.

Nickalls was a member of the *Stock Exchange*, and was "a jobber" there. On the 11th of July, 1865, *Merry* was the owner of fifty shares in a company, called "the *General Estates Company, Limited*," and he gave directions to Mr. *George Burnand*, his

(1) Law Rep. 13 Eq. 203.

broker, to sell these shares. On that day Mr. *Burnand* sold (at a premium of £2 per share) fifty shares in the company to *Nickalls*, who subsequently sold fifty shares in the company to a Mr. *Baker*. On the 8th of July *Baker* had sold fifty shares in the company to a Mr. *Allen*, at a premium of £3 10*s*. per share. All these persons except *Merry* were members of the *Stock Exchange*. *Allen* acted in this transaction as the broker of *James Clifford Hodges*, who was the manager of the company, and *Hodges* instructed *Allen* that the transfer was to be made to the name of *Edward Richard Lloyd*. All the transactions were entered into subject to the rules and usages of the *Stock Exchange*. By those rules and usages there is a particular day called the "account day," on which settlements of such purchases as are above described are made, but before that day arrives there is another day, called the "name day," when any member of the *Exchange* who had bought, would be bound to pass to his seller a ticket containing the name of the person who stands as the purchaser, the price being stated on the ticket. The shares are often sold and resold many times between the date of the first sale and that of the name day, but when the name has been given, and has passed through the hands of the various sellers, the person who can pass it no farther is deemed the ultimate seller, and he and the ultimate purchaser being thus brought into contact the matter is deemed to be concluded. Ten days are allowed for the delivery of shares requiring registration (those not passing by delivery of certificates or warrants) during which time the original seller can inquire as to the name furnished to him, and has the right to object to the person named. In case of his so objecting he can hold his immediate buyer responsible. At the end of fifteen days from the date when the name ticket is furnished the transaction will be treated as complete.

In this case the 31st of August, 1865, was the name day. *Allen* issued to *Baker* the name ticket which he had received from *Hodges*, with the name of *Edward Richard Lloyd* on it as the purchaser. *Baker* passed it on to *Nickalls*, and *Nickalls* passed it to *Burnand*, who made no objection to the name, but received the purchase-money, and delivered to *Allen* a transfer of the shares duly executed to *Lloyd* by the Respondent *Merry*.

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On the 26th of November, 1866, the company was ordered to be wound up, and it then appeared that the transfer had never been registered, but that *Merry's* name still remained on the register of the shareholders, and he was consequently put by the liquidators on the list of contributories. By an order of the Court of Chancery made on the 9th of July, 1868, he was required to pay the sum of £900, that being the sum remaining unpaid in respect of the shares. On the 27th of April, 1869, *Merry* filed his bill against *Nickalls* for an indemnity in respect of the payment on these shares. *Nickalls* denied all liability to make good this payment, contending that under the circumstances which had occurred, and according to the rules and usages of the *Stock Exchange*, he was released from the matter altogether.

Evidence was taken upon the motion for a decree, and it then appeared that no transfer to *Lloyd* could be discovered, and that *Lloyd*, at the time when his name had been so put on the ticket (1865), was a youth, he not having attained majority until the 25th of March, 1870. In his affidavit he said, "At various times while I was in the employ of the *General Estates Company, Limited*, I, at the request of Mr. *Hodges*, the manager, and while I was under the age of twenty-one years, executed various transfers of shares in that company as transferee, both in blank and otherwise," but he did not remember executing any with the name of the Plaintiff *Merry* upon it. There were affidavits from several gentlemen on the *Stock Exchange* giving accounts of the usages of that body, and the rules themselves were proved (1). On the 27th of March, 1872, Vice-Chancellor *Bacon* made a decree dismissing the Plaintiff's bill without costs. On the 31st of July, 1872, the Lords Justices ordered this decree to be reversed, and declared that the Defendant was bound to indemnify the Respondent against all liability incurred in respect of the fifty shares in the said company. This appeal was then brought.

(1) All these matters which were fully brought to the notice of the Court below, but many of which were needless for the decision of the case in this House, are stated in detail in the report of this case when before the Lords Justices, Law Rep. 7 Ch. App. 733. The course which the case took here renders it unnecessary to advert to differences which existed among the members of the *Stock Exchange* as to the practices and usages there.

Mr. *J. Napier Higgins*, Q.C., Mr. *Thesiger*, Q.C., and Mr. *W. Fry Buchanan*, for the Appellant:—

There is no suggestion of fraud on the part of the jobber, the Appellant in this case, which must therefore be decided solely on the question of legal liability. That liability must be determined with regard to the rules of the *Stock Exchange*: *Grissell* v. *Bristowe* (1).

There is here no contract between the Appellant and the Respondent. The contract was between the Appellant and *Burnand*, who, being members of the *Stock Exchange*, stand to each other in the relation of principals.

It may be taken as the established practice of the *Stock Exchange*, a practice by which those who come there to transact business must be bound, *Wigglesworth* v. *Dallison* (2), that after a sale, effected as this was, there is an account day, and there is a name day, and that between the date of the first sale effected by a broker on account of an undisclosed principal, and the giving of the name of the ultimate buyer to the first seller, the stock may be the subject of a great many sales, and that the name of the ultimate buyer may pass through a great many hands before it reaches the first seller. That person has then a certain time for making inquiries, and may, if dissatisfied with it, return it and call for another name. If he does not return it, but accepts it, he must be taken to have declared his approval of it, and from that moment the first buyer, the jobber, is absolutely released from all liability. All these things occurred in the present case, and the Respondent must therefore be taken to have accepted *Lloyd* as the ultimate purchaser, and the Appellant was consequently released. It is an error to say that in such a state of things the first seller, if he suffers a loss, is altogether without a remedy. He has more than one remedy. First, his broker is liable to him; next, he may have a remedy through his broker against other persons; and, lastly, he may proceed against the ultimate purchaser: *Evans* v. *Wood* (3). *Castellan* v. *Hobson* (4) is really to

(1) Law Rep. 4 C. P. 53; see also the report of this case itself, Law Rep. 7 Ch. App. 733.

(2) 1 Sm. L. C. 453, 4th ed.

(3) Law Rep. 5 Eq. 9.

(4) Law Rep. 10 Eq. 47.

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the same effect. The case of *Maxted* v. *Paine* (2nd action) (1), fully establishes all these points, and it besides establishes that when the transfers have been delivered, and the price has been fully paid to the seller, there is a *novation* which frees the member who passed the ticket from all farther liability. That case directly applies to the present in every respect. *Hodgkinson* v. *Kelly* (2) is to the same effect. The first case of *Maxted* v. *Paine* (3) is not applicable here, because of the peculiar circumstances which occurred there, and rendered the application of the general rules impossible. But *Rennie* v. *Morris* (4) is directly in point, and is really decisive of this case. The facts there are almost precisely the same as here, and the decision of the Court was, that by the usage of the *Stock Exchange* the jobber was, in the absence of fraud (and no fraud on the part of the jobber is even suggested here), discharged, after he had given in the name of a transferee, and the shares had been paid for and transferred. [THE LORD CHANCELLOR:—If he gave in the name of a non-existent person?] That might suggest fraud, but if he gave in the name without fraud, and innocently, and as he had received it from a member of the house, he would be discharged. In *Bowring* v. *Shepherd* (5), where the purchaser had authorized his brokers to pass his name as purchaser, and his brokers afterwards, not by his direct authority, but acting according to the rules of the *Stock Exchange*, had accepted the certificates of the shares and the transfer, the contract was held to be completed, and the ultimate purchaser was declared liable to indemnify the seller for subsequent calls, but the intermediate jobber was discharged. All the Judges there thought that when the original seller and ultimate purchaser were thus brought into communication with each other, and the transfer was effected between them, the intermediate jobber was released. *Davis* v. *Haycock* (6) was there discussed and explained. In *Sheppard* v. *Murphy* (7), in circumstances such as exist here, it was held, on the ground of there being no privity of contract

(1) Law Rep. 4 Ex. 203; Law Rep. 6 Ex. 132.
(2) Law Rep. 6 Eq. 496.
(3) Law Rep. 4 Ex. 81.
(4) Law Rep. 13 Eq. 203.
(5) Law Rep. 6 Q. B. 309.
(6) Law Rep. 4 Ex. 373.
(7) Ir. Rep. 1 Eq. 490.

between the first seller and the ultimate buyer, that the intermediate jobber had not been released, but on appeal in that case (1) that decision was overruled, and it was held that the ultimate buyer was liable to indemnify the first seller against calls, which after the date of the transfer he had been obliged to pay, for the ultimate purchaser's name had been given, he had accepted the transfer, and had paid for the shares. The Court of Common Pleas, in the case of *Lord Torrington* v. *Lowe* (2), recognised the decision in *Sheppard* v. *Murphy* (3), and only did not apply it because the facts in *Lord Torrington* v. *Lowe* shewed that there really had not been any privity of contract whatever between that Plaintiff and the Defendant. But in *Coles* v. *Bristowe* (4), where such privity of contract did exist, the jobber made seventeen sales, gave seventeen names, and as many deeds of transfer were prepared and were executed, and the money on the purchases was paid, and consequently the jobber who had first bought the shares, and had acted without fraud, was held to be released. In truth, if this rule of the *Stock Exchange* was not to be allowed to prevail, business there would be impossible; and in no case whatever has the propriety of the rules of the *Stock Exchange* in this respect been impeached; but in *Grissell* v. *Bristowe* (5) they were expressly recognised and approved of. *Paine* v. *Hutchinson* (6), *Stikeman* v. *Dawson* (7), *Nelson* v. *Stocker* (8), *Shepherd* v. *Gillespie* (9), *Weston's Case* (10), and *Levita's Case* (11), were also cited and commented on.

Mr. *Eddis*, Q.C., and Mr. *Benjamin*, Q.C. (Mr. *Horace Davey* was with them), for the Respondent:—

Even if it were to be admitted that the jobber may be released if he gives the name of a real purchaser, who is able and willing to contract and to become the transferee, and who is not objected to, but is accepted, and the transfer is duly made to him, the admission would not affect the present case. For that state of

(1) Ir. Rep. 2 Eq. 544.
(2) Law Rep. 4 C. P. 26.
(3) Ir. Rep. 1 Eq. 490.
(4) Law Rep. 4 Ch. App. 3.
(5) Law Rep. 4 C. P. 36, 48.
(6) Law Rep. 3 Ch. App. 388.
(7) 1 De G. & Sm. 90; 16 L. J. (Ch.) 205.
(8) 4 De G. & J. 458; 28 L. J. (Ch.) 760.
(9) Law Rep. 3 Ch. App. 764.
(10) Law Rep. 5 Ch. App. 614.
(11) Law Rep. 5 Ch. App. 489.

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things assumes something which does not exist here. The jobber here did not give the name of a person able and willing to contract—the name given was that of a person unable to make a legal contract. The contract, therefore, which the jobber entered into with the Plaintiff's broker was not performed. That contract may be assumed to be that the jobber would himself take the shares, or give the name of some person able and willing to take them. He did not give such a name, and therefore he remained liable on the contract which he had made, but not performed. The rules of the *Stock Exchange* cannot be supposed to say that the jobber may release himself by giving any name whatever—the name of a person who cannot enter into a contract, or a name of a non-existent person. If the rules did mean this, they could not be enforced or sustained. All the cases where the jobber has been held to be released, are cases where he gave a name that was, at least, that of a person legally capable of entering into a contract. If he was not pecuniarily capable of performing that contract, and yet the seller accepted him, it might perhaps be said that the seller must suffer, for it might be that the jobber might know nothing of his pecuniary means, and the seller had had the opportunity of inquiry, but where the name was that of a person who could not enter into the contract, the case was the same as if no name whatever was given, and then no one would pretend that the jobber had performed his contract.

It is not true that there is no contract between the first seller and the jobber; there is a perfect contract between them, although it may in form be made by the intervention of a broker, and the contract is to accept the shares or to find a person capable of accepting them. *Torrington* v. *Lowe* (1) in no way impeaches the ruling in the present case, for the facts there satisfied the Court that no contract actually existed between that Plaintiff and that Defendant. Here the contract between them did exist in fact as well as law—it was complete. And in *Paine* v. *Hutchinson* (2) the jobber was only held to be discharged because there was a complete contract between the first seller and the ultimate purchaser. There could be none here. In *Cruse* v. *Paine* (3) the ultimate purchaser not being liable to the seller, the jobber was

(1) Law Rep. 4 C. P. 26. (2) Law Rep. 3 Ch. App. 388.
(3) Law Rep. 4 Ch. App. 441.

held responsible. And in *Maxted* v. *Paine* (1st action) (1), the purchaser had not authorized the jobber to do a certain act which, if properly done, would have completed the contract, but which, not being done, the purchaser was free from liability, and the jobber was held liable. There can be no difference between a case where the purchaser, though competent to contract, is free from liability, and a case where the person named as a purchaser has, because he is legally incapable of entering into a contract, incurred no liability. That case must decide the present. In *Dent* v. *Nickalls* (2) the name of an infant had been passed as the transferee of shares, and no objection was taken within ten days, but the transfer was duly executed to him; the seller had to pay calls; the jobber offered evidence to shew that by the usage of the *Stock Exchange* he was released from liability on passing the name of a transferee. But the jury expressly found that there was no usage to that effect. And in *Allen* v. *Graves* (3) the passing of the name of a foreigner was not treated as sufficient to exempt the jobber from liability. So that, as matter of fact, this easy mode of escaping liability has been negatived, and all the cases shew that the name passed must be, as a matter of law, the name of a person capable of accepting the shares.

It is not necessary to dispute whether a stranger is or is not bound, and if bound, to what extent he is bound, by the customs of a market, *Sutton* v. *Tatham* (4), in which he enters into business transactions; but suppose him to be fully bound by them, it is clear that those customs must be duly observed by the person who wishes to shelter himself under them, and here the Defendant is not released from liability, for the usage of the *Stock Exchange* does not go to the extent he contends for, and he has not complied with the usage, such even as he represents it, for he has not given the name of a purchaser competent and able to contract. *Richardson's Case* (5) shews that a person who pretends to act according to the rules of a market, but is in reality evading them for his own private purposes, may be held responsible; for there the father,

(1) Law Rep. 4 Ex. 81.
(2) 22 W. R. 218; 29 L. T. 536.
(3) Law Rep. 5 Q. B. 478.
(4) 10 Ad. & E. 27; see *Ireland* v. *Livingston*, Law Rep. 2 Q. B. 99; Law Rep. 5 Q. B. 516; Law Rep. 5 H. L. 395.
(5) Law Rep. 19 Eq. 588.

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who had purchased in the name of his son, a minor, and had obtained the registration of his son's name, was held liable on the shares thus purchased and registered.

Mr. *Higgins* replied.

THE LORD CHANCELLOR (Lord *Cairns*):—

My Lords, in this case, which was argued before your Lordships very fully and with great ability, I so entirely concur with the Lords Justices, both in the conclusion they arrived at, and in the reasons they have assigned for that conclusion, that I need not delay your Lordships with any lengthened observations.

The Appellant is a jobber on the *Stock Exchange*, and the Respondent, through his stockbroker, contracted with him for the sale of fifty shares in a joint stock company called the *General Estates Company, Limited*. On the day which is called on the *Stock Exchange* the "name day," the Appellant gave in to the broker of the Respondent a ticket with the name of *Edward Richard Lloyd* as the purchaser of the shares. This ticket had been passed to the Appellant by another jobber. A transfer to *Lloyd* was executed by the Respondent, and the price of the shares was paid. But more than a year afterwards the Respondent discovered that *Lloyd* could give no authority to use his name; that the transfer had not been registered; and that the Respondent's name was still on the register. Thereupon the Respondent filed the bill in the present suit against the Appellant for an indemnity. A decree in favour of the Respondent was made by the Lords Justices, and from this the Appellant has appealed.

It cannot be disputed that a valid contract was made between the Respondent, through his broker, and the Appellant; and that this contract continued for some time to be binding upon both. Nor is it denied by the Respondent that the rules of the *Stock Exchange*, upon which this bargain was made, must be imported into and regulate the contract. The question of difficulty is, what were the precise terms of the contract; and has anything happened, and when, within the terms of the contract, discharging the Appellant from liability under it?

The object of the Respondent was undoubtedly to sell, *i.e.*, to obtain a purchaser for his shares, and, undoubtedly, there was a contract between *Burnand* (who was the Respondent's agent) and the Appellant, for the one to sell, and the other to buy, the shares in question. But this contract, which, if it had stood without more would have admitted of no doubt, must be looked at with reference to the rules of the *Stock Exchange*.

Mr. *de Zoete* has been appealed to as the exponent of the rules of the *Stock Exchange*, and I will now refer to his evidence. He states: "In the case supposed, where the jobber would stand as purchaser, he would on the day preceding such account day (which was usually called the 'name day'), be bound to pass to the broker a ticket containing the name of a person, or of several persons, as the purchaser or purchasers of the said shares; or he might, if he pleased, pass his own name as such purchaser, in which latter case only would he have been bound himself to take to the shares. If the jobber had failed to pass to the broker such a name or names by the name day, the selling broker could have sold out the shares against him, and have compelled him to pay any loss thereon. Until the name day it was not seen who might stand ultimately either as purchasers or sellers, or, in other words, who might be the persons to transfer or to take transfers of shares, and until then a jobber might have had a great many transactions both of buying and selling with the same brokers or jobbers or with various brokers or jobbers. On the name day in the case supposed, if the jobber having purchased had sold again, a ticket, containing the name of the person to whom the shares were to be transferred, would have been issued by and passed on from the ultimate purchasing broker to his seller, and so on through the hands of the other intermediate sellers and buyers in succession, who, whether acting as jobbers or as brokers, had dealt in the shares, until it reached the hands of the original selling broker. Every member passing a ticket was required to write on the back of it the name of the member to whom it was passed; such ticket would also have contained the amount of purchase-money agreed to be given for the shares by the ultimate purchasing broker, and also a note that he would pay the same. So many transactions of this kind took place during the account, that on the name day the

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ticket of necessity only remained in the possession of an intermediate jobber or broker for the time required to take the particulars of it. It sometimes happened that the same ticket passed through the same member's hands several times in fulfilment of bargains made with other members, and, as a matter of fact, he had neither the opportunity, time, nor the means for making inquiries respecting the name so passed. The original selling broker would not have been bound to deliver a transfer of the shares to the ultimate purchasing broker until the expiration of ten days after the account day, and during these ten days the said purchasing broker could not have bought in the shares against the seller. During this time it was open to the original selling broker to object to the name passed by his buyer, in which case such buyer would of course have passed on the objection to the person from whom he received the name as hereinbefore mentioned, and practically such buyer would have had no liability or interest in the question, as whatever grounds there might have been for objecting to the name would have had to be met by the person from whom it emanated, and who had originally issued the ticket, and the committee of the said *Stock Exchange* would, if appealed to by the selling broker, have decided as to the validity of any such objection, and would have required another name to be given in case they had considered it right to do so. But after the lapse of these ten days the selling broker was required to deliver the certificates and transfer of the shares to the said ultimate purchasing broker, or in default thereof, the latter could have bought in the shares against the seller. The usual course of business was for the selling broker to deliver the transfer, together with the corresponding ticket, to the said ultimate purchasing broker from whom he received the purchase-money. The said ultimate purchasing broker did not know to whom his ticket had been ultimately passed until the delivery of the transfer. According to the long-recognised and well-established rules and usages of the said exchange, if the original selling broker did not deliver his transfer and certificates and obtain payment of the purchase-money within fifteen clear days from the name day, his immediate buyer was released from all loss caused by the default of the ultimate purchasing broker to

pay for the shares, and the latter would alone remain responsible; in like manner, if the member who issued the ticket containing the name of the intended transferee of the shares did not buy in, or attempt to buy in, the same shares within fifteen days from the account day, his immediate seller was released from all loss caused by the failure of any member through whose default the shares were not delivered to, and the purchase-money paid by, the ultimate purchasing broker; the jobber had fulfilled all the obligations required of him by the rules and usages of the said *Stock Exchange* in respect of his contract."

My Lords, it appears to me that this evidence clearly describes and contemplates a transaction in which the jobber proposes to the seller the name of a person who is competent and willing to contract, and, as a contractor, to take the place of the jobber who had been the contractor in the first instance. The words used by Mr. *de Zoete*, "the name of a person as the purchaser of the said shares," clearly imply the name of a person who can and will purchase, and would have no application to the name of a non-existing person, a lunatic, an infant, a married woman, or a person who has given no authority to use his name. And, the whole object being, by means of the first contract, to obtain a real purchaser of the shares, it would be in the highest degree irrational to suppose that this first contract could be fulfilled except either by accepting and paying for the shares, or providing some person who would validly contract to do so. In fact, the contract which, both from the nature of the case, and from the evidence of Mr. *de Zoete*, I understand the jobber to make, may be thus expressed: "I" (the jobber) "agree with you" (the seller) "that on the account day I will either myself take, and pay for, the shares, or else I will on that day furnish you with the name of another person who will agree with you to take a transfer of and pay for the shares; and if you desire to inquire into the responsibility of that other person you shall have a limited number of days to do so;" and if this is the contract, it is clear that the jobber is not discharged unless the person whose name he proposes is competent to contract.

The only doubt I could have entertained would have been, whether any obligation was thrown upon the seller, by the rules of the *Stock Exchange*, to inquire as to the capacity and willingness

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to contract of the person whose name was given; but I am satisfied from the evidence that the interval given before completion was to give an opportunity to inquire into the responsibility and not the capacity and willingness of the name given, and that the seller, if content to waive inquiry into the responsibility, was entitled to assume the capacity and authority. And, indeed, it is admitted by Mr. *de Zoete* that, as against the ultimate purchasing broker, the *Stock Exchange* Committee has obliged an indemnity to be given where the name of an incapable person was proposed. But if this was done in the case of the ultimate broker, it shews that the general rule limiting the time for inquiry does not apply to a question of incapacity.

My Lords, I entirely agree with what is said by the Lord Justice *Mellish:* "If the person whose name is on the ticket is willing and able to fulfil the contract, then, as soon as the transfer is made to him, the jobber is discharged." But in the present case there being no person willing and able to fulfil the contract, and the person whose name was on the ticket having given no authority to the jobber to put his name there, the jobber is not discharged.

I will only add that it does not appear to me that this view of the effect of a contract of this kind ought to cause any inconvenience in the transactions on the *Stock Exchange.* The gentlemen forming that body have facilities, through the medium of their rules and their domestic jurisdiction, to take security that no member of the *Exchange* shall pass to another a name which is not real; *i.e.,* which does not describe a person competent and willing to contract.

My Lords, I have not referred to the various authorities commented upon in the argument at your Lordships' Bar. The case of *Maxted* v. *Paine* (1st action) (1) is an authority directly in favour of the view which I have submitted to your Lordships, and I am not aware of any authority opposed to it except the case of *Rennie* v. *Morris* (2), before the late Master of the Rolls, with which decision I am bound to say I am unable to agree.

I have to move your Lordships that this appeal be dismissed with costs.

(1) Law Rep. 4 Ex. 81. (2) Law Rep. 13 Eq. 203.

LORD CHELMSFORD :—

My Lords, this appeal involves a question as to the correctness of the judgment of Lord *Romilly*, as Master of the Rolls, in the case of *Rennie* v. *Morris* (1), upon which Vice-Chancellor *Bacon* principally founded his decree, which was reversed by the Lords Justices. That case and the present case are not distinguishable.

The contract upon which the question arises having been made between a broker and a jobber, members of the *Stock Exchange*, the usage of that body enters into, and to a certain extent determines and governs the nature and effect of the contract.

The usage, so far as it relates to the subject of the appeal, is proved to be that when a broker is instructed to sell shares and a jobber agrees to purchase them, the latter is bound on the day preceding "the account day," which is called "the name day," to pass to the broker a ticket containing the name or names of a person, or of several persons, as the purchaser or purchasers of the shares; and if he fail to do so he is liable to the seller of the shares on his contract. The meaning of this usage, as proved in the case, is perfectly clear. The jobber does not fulfil his contract by merely giving to the selling broker any name as the purchaser of the shares, but only by giving the name of a person who is of ability to contract, and who has consented to become the purchaser. In other words, the jobber is bound to furnish the seller with the means of executing a transfer of the shares to a nominee against whom the obligation to take such transfer can be enforced, and thereby the seller be relieved from all liability with respect to his shares, and until he has done so the jobber has not performed his contract.

The question of the liability of a jobber upon a transaction like the present has been frequently before the Courts both of Common Law and Equity, and has given rise to great differences of opinion. It may however be considered as now settled, that if the jobber, in performance of his contract, gives to the broker of the seller the name of a person who is able to contract, and is willing to be named as the purchaser of the shares, and the name is accepted on the part of the seller, the jobber is discharged. The two cases of *Maxted* v. *Paine* (2) exemplify the distinction established by the

(1) Law Rep. 13 Eq. 203.

(2) (1st action) Law Rep. 4 Ex. 81; (2nd action) Law Rep. 4 Ex. 203; 6 Ex. 132.

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authorities as to the performance or non-performance of the jobber's contract. In the first action the Defendant, the jobber, passed the name of a person as purchaser of the shares without his sanction or authority. The seller therefore could not compel him to accept a transfer of the shares. It was accordingly held that the jobber was not exonerated from liability upon his contract. In the second action the jobber was held to be released by having given the name of a nominee of the real buyer of the shares, a person, it is true, of no means, but capable of contracting, who, in consideration of a small sum of money, had consented to allow his name to be used as the proposed transferee of the shares.

The jobber's contract, therefore, is of this description. It is at first a temporary and conditional contract, but it becomes absolute upon his failure to furnish by the name day the name of a person capable and willing to become the transferee of the shares, so that the seller by executing a transfer may make with him a new contract in substitution of the original one with the jobber. This being the nature of a jobber's contract, it follows as a consequence that the Appellant did not perform what he undertook by giving the name of a person under disability with whom no new binding contract could be made to be substituted for his own. Lord *Romilly*, in *Rennie* v. *Morris* (1), proceeded on an erroneous interpretation of the usage of the *Stock Exchange* with respect to the transactions of jobbers in the purchase of shares for a re-sale. He thought that the jobber had performed his contract when he had given a name to the seller's broker which was accepted, without regard to whether the person whose name was given (in that case as in the present an infant) was of ability to contract or not. But the language of the usage as proved affords no countenance to such a construction. The jobber is not required to give a name of a person merely, but to give the name of a person *as the purchaser*, meaning of course a person capable of becoming the purchaser, whose contract will be binding and enforceable against him. Vice-Chancellor *Bacon*, in deciding the present case, said: "I do not think I should be doing right in departing in the slightest degree from the judgment of the Master of the Rolls in the case of *Rennie* v. *Morris* (1). The cases are identical."

But the Lords Justices were of opinion, and I have no doubt

(1) Law Rep. 13 Eq. 203.

correctly, that the case was not distinguishable on principle from *Maxted* v. *Paine* (1st action) (1). There a person's name was given without authority. In the present case the infant was legally incompetent to give any authority. Therefore they considered that the decision in *Rennie* v. *Morris* (2) could not be reconciled with the principle upon which that case of *Maxted* v. *Paine* was decided. They held that the position of the Defendant down to the time of giving in the name was, that he continued under an obligation to give the Plaintiff an entire release and indemnity against all future liability in respect of the shares; and that the effect of giving in the name and the execution of the transfer to the nominee, was not a fulfilment of the Defendant's contract, as the shares remained still vested in the Plaintiff, because the transfer was a mere nullity. In this opinion I entirely agree.

The counsel for the Appellant argued that the Respondent when, as undisclosed principal, he adopted the broker's contract, adopted it *in omnibus;* that by a regulation of the *Stock Exchange*, if the selling broker discovers that the name passed to him is that of a minor or person under disability, and, within ten days and before delivery of the transfer, objects to such name, he can call upon the jobber to furnish him with another name; and they contended that this course not having been pursued the Appellant was discharged.

But the rule relied upon does not impose upon the broker the obligation of resorting to the mode of arrangement which it offers, and it appears by the proof in this case that the committee of the *Stock Exchange* will give (as the evidence shews it to have been given in *Capper's Case* (3)), a selling broker relief who has suffered by having the name of an infant passed to him as a transferee of shares, although he has allowed as much as two years to elapse before applying to them. How, then, can this rule operate to deprive the Respondent of his right to institute legal proceedings against the Appellant upon his unperformed contract? It is to be observed that the Appellant, before there could be any occasion to apply to the committee, had broken his contract by giving in the name of a person incapable of contracting. According to the

(1) Law Rep. 4 Ex. 81.
(2) Law Rep. 13 Eq. 203.
(3) A case which occurred on the *Stock Exchange*, and was mentioned in Mr. *De Zoete's* evidence. See also Law Rep. 3 Ch. Ap. 458.

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argument of the Appellant the rule would have the effect of ousting the jurisdiction of the Courts, and would prevent the Respondent exercising his option of enforcing his right to relief by proceeding at Law or in Equity.

It was farther argued that the Respondent's remedy (if any) was against his own broker *Burnand*, or against *Allen* the issuer of the ticket, or *Hodges* the real buyer of the shares. As far as respects *Burnand* he had done his duty to his principal by selling the Respondent's shares and making the contract with the Appellant. Assuming that the Respondent, according to *Castellan* v. *Hobson* (1), might have proceeded against *Hodges* to compel him to indemnify him against the payment of calls, that could not have the effect of depriving the Respondent of his remedy against the Appellant for the non-performance of his contract. If this were so, the consequence would be that although the liability of the Appellant to an action for his breach of contract continued, the remedy against him would be gone. It would be a strange answer to an action which admitted (as it must) that there had been a non-performance of the contract, but alleged that the Defendant was discharged by reason of the Plaintiff having a remedy against another person upon a liability of a totally different description.

I agree with my noble and learned friend that the decree appealed from should be affirmed.

LORD HATHERLEY :—

My Lords, I entirely concur in the opinions which have been pronounced by the two noble and learned Lords who have preceded me. The question is really reduced, after much argument, and after reference to a variety of cases which have been cited, to a very plain and simple point.

It has been contended on the part of the Appellant, and so far justly contended, that a person employing a broker on the *Stock Exchange* to sell shares in that market, which has been established for the sale of shares, must be taken to conform to the usages and customs which have been established by the parties in that market as among themselves, for the better conducting of their business,

(1) Law Rep. 10 Eq. 47.

and must be supposed to intend that his shares shall be sold subject to that condition. So far well and good. But, then, what is the condition? Nobody denies that when a broker sells shares for his principal (who is what is called an "outsider," and who has employed him to sell the shares) to anybody in the market, whether a jobber or a broker, there is a good and valid contract made between those parties, that is to say, between the person whose shares are to be sold and the jobber who purchases those shares from the vendor's broker. There is a contract, and that contract must be fulfilled; it must be a contract with somebody, and it must be fulfilled in the first instance by him who made it, that is to say, by the jobber. But there is open to the jobber, according to the practice and custom of the *Stock Exchange* (and there it is that the practice of the *Stock Exchange* comes in), the option of saying: I will give to you the name of a person who has authorized me to give his name instead of my own, and who will perform my contract for me; and when that name is given to you, you shall have an opportunity of inquiring into that person's name (ten days, I think, is the time allotted for such inquiry), and you shall thereby satisfy yourself that the person I name is a person whom I may reasonably propose to you as the person who is to perform the contract which I have entered into with your broker, after which the contract which I have made will cease, and that he is a person whom it is reasonable for me to substitute for myself as contracting with you. You shall have the means to satisfy yourself as to his responsibility in point of means to fulfil that engagement which I have taken upon myself.

Now these are very reasonable rules of the *Stock Exchange*, and nobody can find fault with them. But the very enunciation of them implies that there is a contract to be transferred, and that there is a person to whom that contract is to be and can be transferred. In the first case of *Maxted* v. *Paine* (1) it was held, and, as it seems to me, most justly, that these rules are not complied with by the original vendee's giving the name of a person who has not authorized his name to be given as a substitute. For instance, suppose the vendee had taken the name of any one of your Lordships and handed that name over to the vendor's broker, you

(1) Law Rep. 4 Ex. 81.

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having authorized no such transaction; in such a case the Court of Exchequer has very properly held that that is not a compliance with the rules of the *Stock Exchange*, which rules, as they are testified to by Mr. *de Zoete*, are reasonable enough in themselves, namely, that the original vendee may liberate himself from his contract by giving in proper time (on "name day," as they call it) the name of a proper person to become the purchaser. Handing in a name without proper authority to give it in has been held, as in my opinion it ought to be held, to be not a compliance with the rules of the *Stock Exchange*, and, therefore, not to be a substitution of another person for the original vendee.

Mr. *de Zoete* does not tell you that if a name is handed in which is in fact no name at all—a fictitious name, or a name given without authority, or the name of a person who cannot contract, as being an infant or a married woman—thereupon the original vendee is liberated from his contract. All he says is: You may make a complaint if the name of an infant or of a married woman has been handed to you, to the committee of the *Stock Exchange*. He does not say that any such unreasonable rule has been made as that a vendee who is himself responsible, who has entered into a contract, and is tied and bound by a contract, can deliver himself from that contract by saying: I give you that name, although it is the name of somebody who cannot contract with you—an infant, who might just as well, for the purposes of this discussion, be sixteen months old as sixteen years old, because neither in the one case nor in the other would he have the slightest power of entering into a contract. Mr. *de Zoete* does not say that the vendee can by doing that fulfil his engagement. So far from that being the intention of the rule, which says, "If you find that out and make a complaint, another name shall be substituted," for my noble and learned friend who immediately preceded me has shewn, redress was given in *Capper's Case*, when the complaint was made. The complaint was not made in that case within ten days, but within two years afterwards. *Capper* was allowed to make a complaint and say that he had been defrauded, whether voluntarily or involuntarily is of no consequence, that he had been damaged by the substitution of the name of an infant in place of that of the party with whom he

had contracted, and that the transfer had been made without a knowledge of the facts on his part; and on that being established, the Committee of the *Stock Exchange* insisted upon redress in the form of an indemnity being given.

It appears to me, my Lords, to be as plain as possible—indeed, it is one of the simplest elements of the law of contract—that, it being once admitted that a jobber has made a contract by which he is bound, the jobber cannot discharge himself by saying: I have introduced a person who is utterly incapable of being bound; you must take him in place of me, because the rule of the *Stock Exchange* says so. If such a rule existed, it could not be alleged that there was any common sense, if I may say so, on the face of such a rule; but if ever such a rule should be made, it will be time enough for the Courts of Law to consider how far such a rule should be admitted, or how it can be reconciled with common sense. At present it appears to me that there is no such rule, and that the jobber is bound to liberate himself by producing the name of a person who is capable of contracting. A party who is supposed to be incapable of performing the contract for want of means, but who is capable of entering into the contract, may have given authority to give his name, that is one thing. In that case ten days are given, under the rule of the *Stock Exchange*, to say whether or not you will accept the contracting party whose name is given to you; for he is really a contracting party; but it is another thing if he is a person who cannot, by law, contract. That a contracting party must be produced I think is beyond doubt.

My Lords, I apprehend that when the case comes to be sifted, it is almost decided by a simple enunciation of the facts.

Decree appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 18th March, 1875.

Solicitors for the Appellant: *Morley & Shirreff.*
Solicitor for the Respondent: *W. A. Crump.*

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April 9.

DIRECTORS, &c, OF LLANELLY RAILWAY AND DOCK COMPANY . . . . } APPELLANTS;

AND

DIRECTORS, &c., OF LONDON AND NORTH-WESTERN RAILWAY COMPANY . . } RESPONDENTS.

Railway Companies—Contracts between—Perpetual or revocable—Railways Clauses Act—Railway Arbitration Act.

By an agreement entered into between the directors of two railway companies, the *N. W. Co.* was to have running powers over the *L. Co.'s* lines, subject to the *L. Co.'s* bye-laws; was to be at liberty to have its own staff at the *L. Co.'s* stations, and be allowed a reasonable sum for cartage, clerkage, &c.; the *L. Co.* was to be at liberty to call on the *N. W. Co.* to carry passengers and goods for the *L. Co.* upon the *L. Co.'s* local lines, and both sets of directors bound themselves to send by each other's lines all traffic not otherwise consigned. A chief consideration for this agreement was an advance of money by the *N. W.* directors to the *L. Co.'s* directors; but no mention of this consideration was made in the agreement. Nor, though there were in the agreement provisions for referring to arbitration any differences that might arise as to the agreement, was there any mention of any time for which it was to endure, or how it might be terminated:—

Held, that all the provisions of the agreement shewed that it was a permanent and not a terminable agreement; and that, consequently, a notice to terminate it at the end of six months from a given time was invalid.

Such an agreement appeared to be authorized by the 87th section of the *Railways Clauses Act* of 1845 (8 & 9 Vict. c. 20); and, *semble*, that any differences arising between the two companies occasioned by any hardship felt in the working of the agreement, on either side, might be made the subject of arbitration under the 22 & 23 Vict. c. 59.

An agreement of this kind in no way resembles contracts of partnership, or of hiring and service.

Per LORD SELBORNE:—An agreement *de futuro*, extending over a tract of time which, on the face of the instrument, is indefinite and unlimited, throws upon a person alleging it not to be perpetual, the burden of proving that allegation.

THE Appellants, being in possession of the *Llanelly Railway*, desired in August, 1867, to make certain continuing lines to *Swansea* and *Carmarthen*, but not having capital sufficient for that purpose, applied to the Respondents for assistance. The directors of the *London and North Western Company*, who wanted to get access from their lines at *Shrewsbury* to *Llanelly*, *Carmarthen*, and

Swansea, and could do so by the Appellants' lines, entertained the proposal, and negociations took place between the two bodies of directors on the subject. The money was to be advanced on the terms mentioned in a letter written by Mr. *Biddulph*, the chairman of the *Llanelly Company*, on the 17th of August, 1867, in which he said: "We can give debentures or second preference stock, or original stocks of the *Swansea Line Extension*, guaranteed by the original undertaking, or we can give the lands we have to pay for, or the rolling stock." This letter was answered by Mr. *Moon*, the chairman of the *North Western* directors, by a letter of the 14th of November, 1867, in which he said: "The loan is not mentioned in the agreement, as it had better not appear in the formal document, but the money will be lent on the terms mentioned in your letter." Mr. *Biddulph* replied on the 20th of November, 1867: "I am sorry that the consideration (the loan of the money) cannot be put forward in the agreement;" but he yielded on this point, and the *London and North Western* directors advanced sums which amounted in the whole to £44,660, and received as security preference stock of the original *Llanelly Company*, and also debentures of the *Swansea* undertaking. An agreement, dated the 29th of November, 1867, was then entered into between the two sets of directors, the material parts of which were these:—

1. "Subject to such bye-laws and regulations of the *Llanelly Railway Company* as may be in force from time to time, the *London and North Western Railway Company* shall have power to run over and use with their engines, carriages, vehicles, and servants the railways of the *Llanelly Company*, and their stations, sidings, and conveniences connected therewith."

2. "The receipts for the through traffic shall be apportioned between the two companies (after deducting clearing-house, terminals, and government duty), according to their mileage proportions, with an allowance to the *London and North Western Company*, out of the *Llanelly Company's* share, of 20 per cent. on passengers, and 25 per cent. on goods, for working expenses."

3. "The *London and North Western Company* to be at liberty to have their own staff at the stations on the *Llanelly Company's* lines, and to be allowed (out of terminals) a reasonable sum for the cost of cartage, clerkage, and other work done by them at

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such stations; the same, in case of difference, to be settled by arbitration, as hereinafter mentioned."

4. "Whether the said running powers be exercised or not, there shall be a complete system of through booking, and through rates and fares for all traffic to and from the stations of each company by the lines of each other, the receipts to be divided (after deducting the usual clearing-house, terminals, and government duty) by mileage; such rates and fares, if not agreed upon, to be settled by arbitration."

5. "In the event of the *North Western Company* exercising their running powers, the rates and fares to be fixed by the *London and North Western Company;* but if the *Llanelly Company* object to any such rates and fares, then, after one week's notice, the same shall be referred to arbitration, as hereinafter provided."

6. "The local traffic on the *Llanelly* lines shall not, without the consent of the *Llanelly Company,* be carried on by the *London and North Western Company;* but the last-named company shall, when required by the *Llanelly Company,* carry local passengers by their trains between any stations at which they stop, receiving 15 per cent. of the local fares for so doing."

7. "The two companies shall send by each other all traffic not otherwise consigned, to and from stations on the lines of each other whenever such lines form the shortest route."

8. "Any difference under this agreement to be settled by arbitration, as provided by the *Railway Companies Arbitration Act,* 1859."

No statement of any money consideration for this agreement was inserted in it, nor was there anything said in it, or in the correspondence, as to any period for which the agreement was to endure, or as to any mode of terminating it.

The directors of the two companies acted on this agreement until the 19th of March, 1872, when a written notice was sent by the directors of the *Llanelly Railway Company* to the directors of the *London and North Western Railway Company* to terminate the agreement from the 30th of June then next. The right to terminate it being denied, the directors of the *Llanelly Company,* on the 1st of July filed their bill, praying that it might be declared that it had been put an end to and be ordered to be delivered up to be

cancelled, and that the Defendants might be restrained from running over or using all or any of the railways of the Plaintiffs, and for accounts, and for damages for using the Plaintiffs' railways after the date fixed by the notice.

The case had been originally heard before Vice-Chancellor *Malins*, who refused an injunction on the ground that the matter was one for arbitration under the *Railway Companies Arbitration Act*, 1859 (22 & 23 Vict. c. 59). It had been taken by appeal before the Lords Justices, when that point was not insisted on, but the case was heard as on a motion for a decree. The Lords Justices decided (1) that evidence of the advance of the £40,000 having been the consideration for the agreement was admissible, and that the agreement was permanent and not determinable.

This was an appeal against that decision.

Mr. *Cotton*, Q.C. (Mr. *Thesiger*, Q.C., and Mr. *Stewart Ferrers*, were with him), for the Appellants:—

It cannot properly be argued that an agreement between two railway companies which merely grants to one of them running powers over the lines of another can be perpetual and incapable of termination by either; and the more so, since the grant of the running powers is connected with conditions as to the exercise of those powers. If those conditions were broken by the party undertaking to perform them, was the other bound for ever to submit without the hope of a remedy? Still less is it capable of being argued that the mere fact of the grant of such powers having been made in consequence of a money consideration, can render it perpetual. Besides, no other considerations but those stated on the face of the agreement can be introduced into this discussion. There is nothing in the agreement to shew that there was to be no power on either side to put an end to it. [The LORD CHANCELLOR:—Is there anything in the agreement to shew that such a power was reserved to either party? When was such power to arise? Might it arise the next day?] The fact that there was a possibility of differences arising between the directors of the two companies, and that if they did arise they were to be settled by arbitration, shewed that, in the contempla-

(1) Law Rep. 8 Ch. Ap. 942.

(1) See W.N. (1872) 172.

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tion of the two sets of directors, circumstances might come into operation which would render the continuance of the agreement unendurable, and, of course, would, without specific words to that effect, give the right to put an end to it. It is impossible to believe that the directors on either side meant to bind themselves and their successors for ever. Such an intention can never be presumed either between companies or individuals. The case of *Winch* v. *Birkenhead, &c., Railway Company* (1) afforded a principle of decision which had been entirely disregarded in this instance. There, two bodies of directors entered into an agreement, by which one was to allow the other for the term of ninety-nine years to work its lines and use its plant, on certain terms as to working expenses and maintenance of works, and there was even a covenant that the property should be restored at the end of that time in a proper condition to the granting company, and, beyond that, there was even a provision for application to Parliament if necessary. A shareholder there being dissatisfied with the agreement, filed his bill to have the agreement cancelled, and it was held that it was against public policy, as well as contrary to the powers possessed by the directors under their Acts, to enter into such a contract. In truth, it was a handing over by the granting directors to another body of persons, all those powers over the property of their shareholders which their own Acts had intended them to exercise. A contract like this must be bad, for the same objection exists to it, and it is foreign to the object for which the company was established. There is no mutuality of advantages in it; it is one-sided, and it cannot, therefore, be enforced. There was such mutuality in *Great Northern Railway Company* v. *The Manchester, Sheffield, &c., Railway Company* (2), which was in fact the ground of the decision in that case. There is no doubt that the directors of two companies may contract together for business arrangements convenient to both: *Hare* v. *London and North Western Railway Company* (3); but where the contract is plainly one-sided, where one appears, as in the clause in the agreement here relating to the staff of the *North Western* being put upon the *Llanelly* line, to hand over

(1) 5 De G. & Sm. 562. (2) 5 De G. & Sm. 138.
(3) 2 J. & H. 80; 30 L. J. (Ch.) 817.

its whole management to another body, and where one of the companies may suffer considerable disadvantages without obtaining any corresponding benefits, such contracts cannot be supported and will not be enforced (1). And no authority can be produced where, because directors have a power to make a contract on behalf of their company, they have a power to make that a perpetual and indefeasible contract. In contracts of hiring and service, and in contracts of partnership, which are cases analogous to the present, there can be no implication of perpetuity; the law does not and cannot imply it, nor will the law do so here.

Mr. *Glasse*, Q.C., Mr. *Herschell*, Q.C., and Mr. *Speed*, were for the Respondents, but were not called on.

THE LORD CHANCELLOR (Lord *Cairns*):—

My Lords, if this case had admitted of any reasonable doubt, your Lordships would, I am sure, have been glad to hear any observations which might have been made by the counsel for the Respondents. But I cannot but think that your Lordships will be of opinion that the judgment of the Lords Justices is clearly the correct judgment in the case, and that the construction of the document which is presented for your Lordships' consideration is one which does not admit of any ambiguity or contest whatever.

It is necessary to bear in mind the position of the two contending companies in the year 1867, when the agreement in question was made. Beyond all doubt it was for the interest of the *London and North Western Railway* directors to obtain a satisfactory arrangement for the use of the line of the *Llanelly Company*, that is to say, for the running of their trains over that line, in order that they might obtain a connection between their general system in the north and north-west of *England*, and the important seaport of *Swansea*, in the south-west of *Wales*. But the *London and North Western Railway Company* might have obtained, even as against the will of the *Llanelly Company*, powers of the kind which they desired; they might

(1) See *Shrewsbury, &c., Railway Company* v. *North-Western Railway Company*, 6 H. L. C. 113.

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have applied for facilities for passing their traffic over the *Llanelly Company's* lines—for what are technically called running powers; and if those powers had been refused, they might have applied to the Board of Trade for the purpose of obtaining facilities, to be settled by authority, for the passing of their traffic over the line of the *Llanelly Company.* But, my Lords, the *Llanelly* directors were at this time in need of advances of money, for the purpose of their undertakings, or of some of them; and the *London and North Western* directors being in a position to advance money, your Lordships find that an arrangement was made that an advance of £40,000, or thereabouts, should be made by them to the *Llanelly* directors as a loan, and upon the ordinary debentures and securities of the *Llanelly Company.* It was an object to the *Llanelly* directors to obtain that money, even although they obtained it upon the terms of having to repay it.

My Lords, it appears that it was this power possessed by the one set of directors to accommodate the others, which was made the means of producing an arrangement, and which actually did result in the agreement of 1867 to which I have referred. The consideration, so far as it resulted from this advance of money by way of loan, was not stated upon the face of the agreement. There was, however, nothing upon the face of the agreement negativing the fact of such a consideration, and your Lordships find, not only that this consideration did pass, but that it was treated openly between the parties as the consideration for the agreement, or part of that consideration. For you find that on the one hand Mr. *Moon*, the chairman of the *London and North Western* directors, on the 14th of November, 1867, wrote: "The loan is not mentioned in the agreement, as it had better not appear in the formal document, but the money will be lent on the terms mentioned in your letter." And the answer to that letter was written by Mr. *Biddulph*, the chairman of the *Llanelly* directors, on the 20th of November, 1867, when he said, "I have sent on the agreement to Messrs. *Maynard & Co.*, and requested them to see Mr. *Blenkinsop* on the same. There are some slight alterations required, I think, to make it clear; and I am very sorry that the consideration (the loan of the money) cannot be put forward in the agreement; however, if this cannot be, I propose to hand you £10,000 of deben-

tures with the agreement for £10,000 cash, so as to nail the proceeding."

Now, my Lords, with these observations, I approach the consideration of the agreement itself. The first three clauses relate to the granting and to the exercise of the running powers. By the first clause the running powers of the *London and North Western Railway Company* over the lines of the *Llanelly Company* are to be "subject to the bye-laws and regulations of the *Llanelly Railway Company*." But, subject to those bye-laws and regulations, the *North Western Railway Company* is to "have the power to run over and use, with their engines, carriages, vehicles, and servants, the railways of the *Llanelly Company*, and the stations, sidings, and conveniences connected therewith." There is nothing in that term beyond the granting of a license or right to exercise ordinary running powers. The second clause is, that "the receipts from the through traffic shall be apportioned between the two companies (after deducting clearing-house, terminals, and Government duty) according to their mileage proportions, with an allowance to the *London and North Western Company*, out of the *Llanelly Company's* share, of 20 per cent. on passengers, and 25 per cent. on goods, for working expenses." My Lords, I apprehend that that agreement for the division of the receipts from the through traffic, according to certain mileage proportions, with an allowance for working expenses where working expenses were incurred by the *London and North Western Railway Company*, is entirely such an agreement as was contemplated by the 87th section of the *Railways Clauses Act* of 1845. The third clause of the agreement is, "the *London and North Western Company* to be at liberty to have their own staff at the stations on the *Llanelly Company's* lines, and to be allowed (out of the terminals) a reasonable sum for the cost of cartage, clerkage, and other work done by them at such stations, the same in case of difference to be settled by arbitration as hereinafter mentioned." My Lords, I do not read that as supplanting in any way the staff of the *Llanelly Company*, or the management by that company of its own stations; it is merely this—just as there was a license for the waggons and carriages of the *North Western Company* to pass by and to use the stations, so here is a license for the *North Western Company's* servants, who might necessarily

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require to be in attendance, in order to take care of the collection and giving out of the traffic at the stations, to be present at the stations, and to have the use of them.

My Lords, up to that point the agreement is in substance a permission to the *London and North Western Railway* directors to exercise the running powers. There is no compulsion upon them to exercise the powers—nor, so far as my experience goes, does it appear to me to be usual in agreements of this kind to lay any compulsion obliging the company to which running powers are conceded to exercise those powers. There is a license to use the powers, and there are the terms prescribed, which are to be the terms upon which the powers are to be used.

The 4th article contemplates on the face of it that the powers either might or might not be exercised: "Whether the said running powers be exercised or not, there shall be a complete system of through booking, and through rates and fares for all traffic to and from the stations of each company by the lines of each other, the receipts to be divided (after deducting the usual clearing-house, terminals, and government duty) by mileage, such rates and fares, if not agreed upon, to be settled by arbitration." I pass over the 5th section. The 6th is: "The local traffic on the *Llanelly* lines shall not, without the consent of the *Llanelly Company*, be carried by the *London and North Western Company*, but the last-named company shall, when required by the *Llanelly Company*, carry local passengers by their trains between any stations at which they stop, receiving 15 per cent. of the local fares for so doing." Then number 7 is: "The two companies shall send by each other all traffic not otherwise consigned to and from stations on the lines of each other, whenever such lines form the shortest route."

Now, my Lords, I will observe here that although, as I have said, the first three terms do not lay any obligation upon the *London and North Western Railway Company* to carry through traffic, and to exercise the running powers, the later sections, and especially that 7th section, appear to me clearly to carry a consideration which would be amply sufficient, as a matter of consideration, to support this agreement upon the face of it, and without reference to the loan to which I have already referred.

The difficulty which the Appellants have here to contend with, I took the liberty of stating to the learned counsel who opened this appeal. It appears to me that either this is an agreement which must be capable of determination at the will of either party, and therefore at the will of the *Llanelly Company*, immediately after being made—the very day after it was made—or it is an agreement which cannot be so terminated; and, if it cannot be so terminated, there is no terminus whatever assigned by the agreement, or put in the power of either of the parties; and if so, the agreement is one which in its nature must continue and must run on.

It appears to me that, looking at the condition of the parties, it is scarcely possible seriously to suppose that an agreement of this kind, founded upon the loan of the large sum of money which I have mentioned—an agreement which in its nature must materially alter the position, the arrangements, the prospects, and the general action of a company like the *London and North Western Company*—could be entered into by the parties one day leaving either of them at liberty to repudiate or terminate it on the next day. And, my Lords, the consideration which I adverted to at the outset, that terms might have been obtained by the *London and North Western Railway Company* by an appeal, if necessary, to the intervention of the Board of Trade, which terms, if once obtained, would have been continuing terms, and terms that could not have been terminated, that consideration throws great light upon an agreement which in its very nature was an agreement of a more favourable kind, but having the same object and the same aim as the terms which would have been assigned by the intervention of the Board of Trade. As those other terms, secured by Act of Parliament, would have been continuing, so this agreement, carrying more favourable terms, appears to me in its nature to be a continuing agreement.

My Lords, reference was made to the well-known cases of contracts of hiring and service and contracts of partnership. These cases appear to me to have no analogy whatever to the present. With regard to contracts of hiring and service the law is well settled as applied to different kinds of hiring and service, assigning to each of them certain notices by which they can be terminated;

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and they are, besides, engagements which depend upon the personal confidence which one of the parties reposes in the other, and which in their nature cannot be supposed to be of a perpetual character. With regard to contracts of partnership they also are already ruled and settled, by law, to be capable of termination at any moment unless a definite limit is prescribed upon the face of them. And, the law being well settled, when you have a contract of that kind, you apply the understood law, and you hold that the parties, knowing what the law was, must be supposed to have intended to enter into a partnership which could at any time be terminated, if they did not provide upon the face of their contract that it should be a continuing partnership. But your Lordships have to decide here without any rule of law already laid down, with regard to agreements of this kind, upon the nature of the agreement itself, and upon the construction of that agreement as we find it expressed; and, applying the considerations which I have pointed out to your Lordships, I should humbly suggest to you, that those considerations clearly lead to the conclusion that an agreement of the kind which I have read, entered into under the circumstances which I have mentioned, must, in its nature, be an agreement which should have a continuing operation, unless some power is given on the face of it to the parties to terminate the agreement.

My Lords, cases of hardship in the working of an agreement of this kind were suggested by the learned counsel for the Appellants. With regard to some of those cases, I am not at all clear that if hardship were to arise it would not be capable of being met by reference to arbitration under the clause providing "any difference under this agreement to be settled by arbitration as provided by the *Railway Companies Arbitration Act*, 1859." But whether that be so or not, it was for the parties, when they entered into this agreement, to consider whether the agreement would, in its working, expose them to the possibility of hardship or not. If hardship should arise from the working of the agreement, and if the agreement is not according to its construction terminable, the agreement must be got rid of, not by the parties breaking their contract, but by an appeal to some higher power, namely, a Parliamentary power.

My Lords, I think that the decision of the learned Lords Justices is entirely correct, and I move your Lordships that this appeal be dismissed with costs.

LORD CHELMSFORD :—

My Lords, the only question in this case is, whether the agreement between the companies, which is indefinite and unlimited as to time, is perpetual, or revocable upon notice. The agreement gives to the *London and North-Western Railway Company* running powers over the *Llanelly Railway*, but confers no such power on the *Llanelly Railway Company* over the *London and North-Western Railway*. And it is said that to construe an agreement, which is not reciprocal, and which binds the *London and North-Western Railway Company* to nothing, to be perpetual, would be unreasonable. But if the agreement is expressive of permanence it is of course immaterial to its construction that it is entirely in favour of one side only.

Now, as was observed by Lord Justice *James*, there are several indications in the agreement which shew that it must have been intended to be permanent. In the first place, the running power is given to the *London and North-Western Railway Company* "subject to such bye-laws and regulations of the *Llanelly Railway Company* as may be in force from time to time." If the running power had been given only during the pleasure of the *Llanelly Company*, this clause would be perfectly unnecessary, because, if the *London and North-Western Railway Company* did not observe the regulations which the *Llanelly Company* might make from time to time, the *Llanelly Company* might determine the agreement. Again, by the 3rd clause, the *London and North-Western Railway* directors are to be at liberty to have their own staff at the stations on the *Llanelly Company's* lines. Now, if the agreement is revocable, no sooner would the *London and North-Western* directors have stationed their clerks and servants at the different stations of the *Llanelly Company*, than the *Llanelly* directors might have rendered all the expense and trouble thereby occasioned wholly fruitless by revoking the agreement. Then, again, the clause with regard to arbitration seems to me to speak of permanence. Notwithstanding the observations of the learned

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counsel for the Appellants, it seems to be strong to shew that the agreement must be intended to be perpetual, because if it was terminable by the *Llanelly* directors, they had a speedier way of determining any differences by putting an end to the agreement than by going into arbitration upon it.

I must, however, make a remark upon Lord Justice *Mellish's* opinion. He said that the agreement being one-sided he should not feel disposed to construe it to be perpetual unless proof had been given of a consideration before the agreement. If consideration be necessary, it appears to me that it may be found in the deed itself. It may be observed in the first place that a deed, that is an instrument under seal, always imports consideration. But in addition to that there are the clauses of the agreement which have been read by my noble and learned friend, namely, the 4th, 5th, 6th, and 7th clauses, which contain, in my opinion, ample consideration to support the deed, if consideration had been necessary.

Upon the whole, therefore, my Lords, I agree entirely with my noble and learned friend, that the decree ought to be affirmed.

LORD HATHERLEY:—

My Lords, I have come entirely to the same conclusion as has been already expressed on the nature of this agreement. Just look at what the position of the parties was when it was entered into. The *London and North Western* directors no doubt would be desirous, in certain circumstances and events, to have the power of running over the *Llanelly Company's* line, upon reasonable terms. They might get by Acts of Parliament running powers over the *Llanelly* line to be obtained in the manner pointed out by the Acts; but of course it would be more advantageous, I may say to both parties, that they should have those powers settled and fixed in a definite way. Then the circumstance that they wished to acquire the running powers was so far from implying that they were about to enter into an agreement to compel them to exercise their running powers that it rather leads you to the contrary conclusion. They would wish to have those powers of running when they should desire to exercise them, and they would wish to have the terms laid down.

When you look at the agreement you see that the agreement

itself distinctly contemplates the possibility of the *London and North Western* directors not exercising the running powers, because the 5th clause says that "in the event of the *London and North Western Company* exercising their running powers" then the rates and fares are to be fixed in a certain way. The provision that those rates and fares are to be fixed "in the event of their exercising" the powers shews that the parties who met together to form this agreement contemplated the other contingency as a possible one, to say the least, namely, that they would not exercise them.

Then, my Lords, it is said for the *Llanelly Company:* This is an entirely one-sided agreement if you give the construction to it that it is a permanent agreement enabling the *London and North Western Company* to exercise their running powers on the terms and in the manner herein described. But, my Lords, it is not by any means a one-sided agreement, because, in the event of the *North Western Company* exercising the running powers, another result takes place. By the 6th clause, if the *London and North Western* directors choose to exercise such powers, they are compellable to take the local passengers desiring to proceed from one place to another on the *Llanelly Company's* line only; they may be required to take them by their trains, that is by the general through trains, between any stations at which they stop, receiving a certain payment out of the local fares for so doing: so that there is a mutual accommodation in that respect. If the *London and North Western* directors having obtained the running powers for that consideration and upon the terms hereby expressed, should exercise those powers, they are compellable to carry the passengers of the *Llanelly Company* when required to do so. Farther than that, the 7th clause, as the Lord Chancellor has observed, provides that "the two companies shall send by each other all traffic" not otherwise consigned "to and from stations on the lines of each other whenever such lines form the shortest route." This stipulation with respect to through traffic was a considerable boon, I apprehend, to the smaller company.

That having been settled, and there being that compulsory control which the *Llanelly* directors might exercise of compelling the *London and North-Western* to carry their local traffic, it became absolutely necessary that there should be the provision

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which we find in the second clause, that the receipts from the through traffic should be apportioned according to the mileage, "with an allowance for the *London and North-Western Company* out of the *Llanelly's Company's* share," of so much per cent. on passengers, and so much per cent. on goods. And the third clause became necessary, "that the *London and North-Western Company* should be at liberty to have their own staff at the stations on the *Llanelly Company's* lines," for if they were obliged to take up and put down passengers in their carriages who were merely passengers upon the local railway, it was only right and reasonable, at all events, that they should say: In that case we must have our own staff at these particular places. In passing, an observation was made on that clause by the Appellant to this effect: that is handing over all the management of the railway to the *London and North-Western Railway Company*, which would be contrary to the true spirit of the Railway Acts, and that that might be contended to be contrary to law. I apprehend, my Lords, that the circumstance of their having their staff in order to carry on, by means of their clerks, this booking process, which was necessary if they were to be compelled to take the passengers, cannot by any force of conjecture or argument be turned into a handing over in any way of the control of the *Llanelly Company* itself, and of the servants of the *Llanelly Company*, to the *London and North-Western Company*. The *London and North-Western Company* would remain, as it is provided by the first section that it should remain, subject to the bye-laws and regulations of the *Llanelly Company* in the exercise of these running powers.

Then, my Lords, that being so, I am at a loss to see how it can be supposed that an agreement of this kind, the subject-matter being such as I have described it, namely, the exercise of running powers over the *Llanelly Railway*, which for all time would be of use to the *London and North-Western Railway Company*—how it can be supposed, nothing being said in the agreement to that effect, that they entered into this agreement only with this view; this will be an agreement which shall be valid and binding on us and the *Llanelly Company* so long as we think fit on either side, and no longer: we are to provide the clerks: if we start a traffic of our own, if we exercise our running powers, we are to be compellable to carry the local passengers, and we must accommodate

our rolling stock for the purpose of carrying that extra amount of traffic which we should otherwise not have had to carry; we must provide that stock, and we must also provide the necessary staff of clerks, and when we have done all that (I will not say this week, because it is not necessary to put the highest and most improbable case, but), when we have done that and gone on for six months, then the *Llanelly Company* may find the agreement, in some way or other, to be burdensome, and may say: We do not care in the least for your additional rolling stock, or for the additional staff of clerks that you have provided, but we give you notice to terminate the agreement; and we shall terminate it accordingly. I have not said anything about the £40,000, but I have confined myself strictly to the agreement. To suppose any company would enter into an agreement of that kind seems to me to be an entirely irrational supposition, and there is nothing which should induce your Lordships to fix a limit when none can be fixed which is reasonable as between the parties, and nothing is said as to such a limit from beginning to end of the contract.

My Lords, it was ingeniously attempted to compare this to a case of partnership. Now in reality there is nothing like partnership in any part of the transaction; indeed, the transaction is rather the reverse of partnership. The force and object of the agreement is to secure to each company, not for its supposed co-partner, the other company, but for itself, the advantage accruing from all the work that it does—to say that each company shall be paid for all the work it performs. After the necessary deduction for duty and terminals, they are to be paid out of the receipts, according to mileage, of each company, and when the one set of clerks, namely, the *London and North-Western* clerks, do the duty of booking as servants for the other company—not as acting in the capacity of agents for the co-partnership, but when they shall do the work which otherwise the *Llanelly Company* would have had to do—there shall be an allowance of 15 per cent. on passengers and 25 per cent. on goods made for that purpose. It seems to me to be simply a common agreement between two railway companies as fairly as possible to divide the receipts in proportion to the work each has done. That is very far indeed from being a partnership—rather the contrary.

I apprehend, therefore, that neither on the supposed ground of

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the analogy of a partnership, in which a contract may be determined, and has long since been held to be terminable, for divers good reasons which it is not now necessary to enter into, nor upon the ground that there is anything whatever which can, on the face of the agreement, indicate the slightest intention on the part of these parties that the agreement should be terminable in the manner described, can your Lordships hold that the contention of the Appellants is just. They have raised a strong contention. They say: Well, but if it would be hard on the one company that, immediately after they had incurred expense, the agreement should be terminated, it would be equally hard upon us when we, by the laches of the other company, shall have put ourselves to expense, to be told they are not going to take advantage of their agreement. But there appears to be on the face of the agreement a contemplation of that very state of circumstances, namely, that the one company may for a time not think it necessary to exercise these powers, there being those provisions which I have referred to in that behalf, and the Appellant company would of course have had it within its own knowledge that, if the Respondent company did not exercise those powers, it would fall on the Appellant company, if they intended to work their line, to work it themselves for their own traffic by their own means, and for their own interests. Indeed, so far from contemplating any hardship on that score, they make it a point of stipulation that the *London and North Western Company* shall not, without their leave and sanction, interfere with the local traffic. They contemplated at that very time, in all probability, that they would themselves carry the local traffic. But they say: If you do use your running powers, we will also secure to ourselves the additional advantage of being able to compel you to deal with our local traffic, if we find it necessary or desirable to do so. That, my Lords, is the whole case. Any argument that arises upon a state of circumstances which the agreement shews the parties to have contemplated cannot avail to give a different construction to the agreement, and one which in itself would appear to be utterly unreasonable, namely, that at any moment all the advantages the *London and North Western Company* are entitled to by it, could be made to disappear in spite of the expense and inconvenience accruing to them thereby, when they could have taken a much more easy

mode of having the arrangement for the exercise of their running powers made by the Board of Trade. The payment of the £40,000 adds strength no doubt to these observations, but I think if it stood on the agreement alone, and we had nothing to do with the £40,000, your Lordships would still come to the conclusion that it was a permanent agreement.

LORD SELBORNE:—

My Lords, an agreement *de futuro*, extending over a tract of time which, on the face of the instrument, is indefinite and unlimited, must (in general) throw upon any one alleging that it is not perpetual, the burden of proving that allegation, either from the nature of the subject, or from some rule of law applicable thereto. So far as the words go, there is here no limit; and if any limit, or the power of fixing a limit, is to be implied, it can only be in one or other of these two ways.

In the present case, the character of perpetuity attaches both to the legal personality of each of the contracting parties, and to the legal character and use of the subject matter, the railway; and the objects of the agreement are favourably regarded by the law; all such companies having express statutory powers to contract (without any necessary limit of time) for such objects, and being (in the absence of contract) to some extent always under legal obligations, actual or potential, of a like general character.

All these considerations, so far from introducing any implication from the nature of the subject-matter, or from any rule of law, against the natural import of the unlimited terms (as to time) in which this particular agreement is expressed, tend to confirm the *primâ facie* conclusion that an agreement expressed in such indefinite terms is to have unlimited duration. The whole circumstances under which this agreement was made, and its particular terms, support the same conclusion.

Decree appealed from affirmed; and appeal dismissed with costs.

Lords' Journals, 9th April, 1875.

Solicitors for the Appellants: *Markby, Tarry, & Stewart.*
Solicitor for the Respondents: *R. F. Roberts.*

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April 16.

ARTHUR F. L. DORIN . . . . . APPELLANT;

AND

MARGARET CHRISTIANA DORIN, CHARLES A. DORIN, AND WILLIAM J. A. DORIN . . . . . RESPONDENTS.

Will—Illegitimate Children—Description.

The word "children" in a will means *primâ facie* "legitimate children," as much so as if the word "legitimate" had been introduced before it.

Where, therefore, a person who had had two illegitimate children by a certain woman, married her, and the day after his marriage made a will in which, after leaving her his real and personal property for life, he said, "I leave her at liberty to direct the disposal of the property amongst *our children* by will at her death in such manner as she shall think fit, and should she make no will I desire that the property existing at her death shall be divided, as far as it may be practicable to do so, equally between *my children by her*:" and had not any child born after the date of the will; but lived for some time after making it, and always treated the two illegitimate children as his own children:—

Held, that the real and personal estate of the testator was, subject to the interest given to the widow for her life, undisposed of by the will.

The costs were ordered to be paid out of the estate.

THIS was an appeal against a decision of Vice-Chancellor *Malins*, which having been duly inrolled, was brought up to this House.

The testator, *Joseph Alexander Dorin*, went out to *India* at an early age. In 1823, he married at *Calcutta* a Miss *Anna Patton*, by whom he had two sons, *Henry Alexander*, who was born in 1824, and *James Augustus*, who was born in 1828. The latter was killed during the mutiny, and left no child; *Henry Alexander* married and had one son, the present Appellant. He was born in 1846, and in 1853 he was brought to *England* by his maternal grandmother, and lived with her. The wife of the testator had been an invalid for years, and had come to *England* for the benefit of her health. Some time before 1855, the testator, being then in *India*, formed a connection with the now Respondent, *Margaret Christiana*, then the widow of a Mr. *Twentyman*. There were two children of this connection, *Charles Alexander*, born in November,

1855, and *William J. Alexander*, born in 1861, after the testator's final return to *England*. After the testator had left *India*, and finally returned to *England*, he resided for some time with his wife, but in 1858 purchased a house in *Bayswater*, where he and Mrs. *Twentyman* took up their abode together. On the 9th of April, 1863, the testator's wife died, and a year after her death, the 29th of April, 1864, he married Mrs. *Twentyman*. The two children, *Charles Alexander* and *William Alexander*, lived with them, and were always acknowledged by the testator as his children, and on their baptism in the Roman Catholic Church the testator gave to the officiating priest, according to the requirement of that Church on the occasion of baptising illegitimate children, his formal consent in writing to their baptism as his children. On the day after this marriage the testator executed the will the construction of which was now in contest. The will was in the following terms:—"I bequeath all I possess, real and personal property, to my wife *Margaret Christiana Dorin*, in trust that she should apply the same to her own personal use during the term of her natural life. And I leave her at liberty to direct the disposal of the property amongst our children, by will, at her death, in such manner as she should think fit, and should she make no will, I desire that the property existing at her death shall be divided as far as it may be practicable to do so, equally between my children by her." And he named her sole executrix.

The testator, who never had any child born to him after his second marriage, died on the 22nd of December, 1872, and on the 16th of January, 1873, the will was proved by his widow Mrs. *Margaret Christiana Dorin*, his sole legal personal representative.

The testator's heir-at-law and next of kin is the Appellant.

On the 28th of February, 1873, Mrs. *Margaret Christiana Dorin* filed a bill against *Arthur Frederick Lock Dorin* (the Appellant), to which bill her two sons *Charles Alexander* and *William J. Alexander Dorin* were also made parties, praying that the will might be administered under the direction of the Court, and for accounts, and for general relief.

An answer was put in, and the cause came on for hearing before Vice-Chancellor *Malins*, who made a decree on the 20th of December, 1873, by which he declared that the testator had

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given to the Plaintiff power to appoint, by will, his real and personal estate amongst the Defendants *Charles Alexander* and *William J. Alexander Dorin*, and, in default of such appointment, the real and personal estate would, on the death of Mrs. *Dorin*, be divided equally between them. And as to the Appellant, the bill was ordered to be dismissed (1). This decree was duly signed and inrolled on the 14th of April, 1874, and this appeal was then brought.

Mr. *J. Pearson*, Q.C., and Mr. *F. C. J. Millar*, for the Appellant:—

The decision here entirely disregards the rule that *primâ facie* the word "children" in a will means legitimate children only. To give it a different meaning there must be something in the will itself to shew intention to that effect on the part of the testator. And that intention must be so clearly expressed as to exclude any other. That cannot be said of the will in this case. Extraneous evidence that the testator had always treated the illegitimate children as if they had been legitimate is not sufficient for that purpose. There is nothing here to mark any intention on the part of the testator that the word he used should have any but its ordinary legal meaning. That meaning will amply satisfy the words of the will, and must therefore be applied to them. There is not here such a description of the illegitimate children as would fix upon them exclusively the character of the objects of the testator's bounty. Conjecture must not be resorted to for the purpose of giving a meaning to words that have a fixed legal meaning of their own; but if conjecture was to be here introduced, no one could deny that "my children by her," and "our children," would be well satisfied by children born of the testator and his wife after their marriage; and such children would be those on whom the law itself would fix the succession. The will would certainly afford a provision for any legitimate children the testator might have after the marriage, and therefore illegitimate children must be excluded from benefit under it, for the two classes cannot take together under the general description of "children." *Swaine* v. *Kennerley* (2) is directly in point. There the description used was "children," and though

(1) Law Rep. 17 Eq. 463. (2) 1 V. & B. 469.

there were illegitimate children existing at the time of the will, as the will itself gave only that general description, and did not identify the illegitimate children as the objects of the testator's bounty, Lord *Eldon* held a legitimate child to be the only person entitled to be treated as the devisee. And that case was all the stronger because there were three children at the date of the will, two illegitimate and one legitimate, and the will had expressly directed a division among "the children," which shewed that the testator had in his mind more than one.

[*Owen* v. *Bryant* (1); *Cartwright* v. *Vawdry* (2); *Beachcroft* v. *Beachcroft* (3); *Wilkinson* v. *Adam* (4); *Harris* v. *Lloyd* (5); *Evans* v. *Davies* (6); *Warner* v. *Warner* (7); *Lepine* v. *Bean* (8); were also cited.]

Mr. *Glasse*, Q.C., and Mr. *Cotton*, Q.C. (Mr. *Vaughan Hawkins* was with them), for the two children Respondents:—

This case did not rest on the words of the will alone. Evidence of the state of the testator's family had properly been admitted, and that evidence plainly shewed what his intention was when he made the will. He had two children then alive, born some years before the date of the will. He had always treated them as his children; he married their mother. Having married her, he made his will, describing her as his wife, and giving her all his real and personal property for her life, and then directing the disposal of it "amongst our children." In this way he left the form and proportion of its distribution to her decision; but should she make no will, then he directed that it should be divided equally "between my children by her." It is difficult to imagine how he could, except by the formal repetition of their names, have more distinctly pointed out whom he intended as the persons to take the property after her death. [THE LORD CHANCELLOR:—Would not the words of the will be satisfied by applying them to children born after the marriage?] If he had had any such children that might be so, but he lived above eight years after the date of the will, and had

(1) 2 De G. M. & G. 697.
(2) 5 Ves. 530.
(3) 1 Madd. 430.
(4) 1 V. & B. 422; affirmed 12 Price, 470.
(5) 1 T. & R. 310.
(6) 7 Hare, 498; 18 L. J. (Ch.) 180.
(7) 20 L. J. (Ch.) 273.
(8) Law Rep. 10 Eq. 160.

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no child after he made it. During all that time he treated these two children as his own. He had done enough to secure that these two children should succeed to his property. If there is a sufficient description of the children, they, though illegitimate, will take: *Holt* v. *Sindrey* (1). There is such a sufficient description here. *Hill* v. *Crook* (2) was a clear and strong illustration of that kind, both in the Court of the Lords Justices and afterwards in this House. There the children were clearly illegitimate, yet all were allowed to participate in the property. And that case was followed by *Occleston* v. *Fullalove* (3), where the expressions in a will that would afford a sufficient designation of illegitimate children as objects of the testator's bounty were fully discussed. A child born after the date of the will, where the words were "all other children which I may have or be reputed to have by *M. L.*," was declared entitled to take, notwithstanding the supposed rule which excludes after-born children from such benefit. That rule was stated by the Master of the Rolls in *Pratt* v. *Mathew* (4), and was fully considered in *Occleston* v. *Fullalove*, but was not there acted on, because it was deemed that the will had not left any doubt as to the children really intended, but had distinctly pointed them out as persons who were to take. They were equally well pointed out here by the words of the will, which could not be made applicable to any but these two children. And in addition to that there was the constant recognition by the testator of these two children as his two children from the date of his will to the time of his death. The circumstances of the state of the family and the words of the will left no room for doubt as to what was the testator's intention; and where the intention is clear, the intention must govern the construction of words used in the will.

Mr. *Horton Smith* appeared for Mrs. *Dorin*, but was not called on to address the House.

Mr. *Pearson* in reply:—

The words in this will would apply to children born after the testator's second marriage. If so, they, and they alone, could take.

(1) Law Rep. 7 Eq. 170.
(2) Law Rep. 6 Ch. Ap. 311; Ibid. 6 H. L. 265.
(3) Law Rep. 9 Ch. Ap. 147.
(4) 22 Beav. 328.

Illegitimate children could not take with them by the mere description of children as a class: *Hill* v. *Crook* (1).

THE LORD CHANCELLOR (Lord *Cairns*):—

My Lords, the question which arises for your Lordships' consideration in this case is an extremely short one; and especially, having regard to the circumstance that all the authorities bearing upon the question were so lately considered in your Lordships' House (2), I do not propose now to detain your Lordships at any length by what I have to say with regard to the case.

My Lords, I adhere to the conclusions which I was able, upon the consideration of the case of *Hill* v. *Crook* (1) to draw from the various authorities there cited. According to those conclusions, I feel myself bound to ask whether, with a knowledge of the position, and what are called the surrounding circumstances, at the time the testator made his will, there is anything upon the face of the will which enables me to say that those who in the eye of the law were not his children, were intended by him to take under the general expressions used in his will, namely, "I leave her" (meaning his wife) "at liberty to direct the disposal of the property amongst our children, by will, at her death, in such manner as she shall think fit, and should she make no will I desire that the property existing at her death shall be divided as far as it may be practicable to do so equally between my children by her." The testator who used these expressions had been married to the wife of whom he speaks the day before he made his will. He had had two children by her, who at that time were of the age, as I gather, the elder of about eight or nine, and the younger nearly three. They were clearly illegitimate children.

I ventured to put to the learned counsel who argued the case at the Bar, this question: supposing that it had been in the mind of the testator, and we do not know and cannot know what his mind was except by his own expressions—supposing it had been in his mind not to take any notice of these children in his will, or to make any provision for them by his will, but to make a provision for them in some other way, and to use his will to designate merely his wife and any legitimate children who might be afterwards born, would not every word in the will be satisfied? Undoubtedly every

(1) Law Rep. 6 H. L. 265. (2) *Hill* v. *Crook*, Law Rep. 6 H. L. 265.

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word would be satisfied. Therefore, if that is so, you are not able to say that the will upon the face of it constrains you to depart from what is the ordinary and *primâ facie* legal meaning of the word "children." When the case is considered that is the true result. There is no case whatever which would enable us, in the interpretation of this will, to strain the word "children" beyond its ordinary legal meaning.

My Lords, what the result of the decision may be it is impossible for me to say as regards property, or the effect that the intestacy will have as between the various persons interested. It is not for your Lordships to regret the result of what is the true and proper application of the rules of law. All that your Lordships have to do is to determine what is the true application of the rules of law; and in my opinion, which I submit to your Lordships, the true application of those rules requires us to hold that, subject to the life interest given by the will to this lady, there is, in the events that have happened, no disposition which carries the estate of the testator farther, for he died, as we understand, without any legitimate children of his second marriage surviving him.

My Lords, I therefore move your Lordships that the decree of the learned Vice-Chancellor should be varied, and that a declaration should replace that made by him—a declaration that, according to the true construction of the will of the testator, and in the events that have happened, the real and personal estate of the testator is, subject to the interest given to the widow for her life, undisposed of.

LORD HATHERLEY:—

My Lords, I am of the same opinion.

The difficulty that we have to encounter in endeavouring in any way to accede to the argument for the Respondents in this case is, that there are words used in this will which have a perfectly definite legal sense, and admit *primâ facie* of no other sense. *Primâ facie* the word "children" means legitimate children, and, as has been stated in several cases, as much so as if the very word "legitimate" had been introduced before it. Here we find a testator just married, providing in a manner which would be perfectly natural according to the ordinary legal use of the term "children," that is to say, providing a life estate for his wife,

saying nothing of any existing children, but saying that his wife at her death is to dispose of the property as she thinks fit "amongst our children," and that if she does not do so, the property which should be existing at her death should be divided as far as practicable "equally amongst my children by her." Words could not express more accurately what would be done by any testator who had recently married and was desirous of providing for a family that he might in future have.

The only mode in which the word "children" can be made to bear a different sense from that which is its first legal and natural sense is this, that if you look to the outward circumstances as well as to the expressions contained in the will, and find that the outward circumstances of the case, combined with the expressions contained in the will, fail to give any adequate or intelligible sense to the will, then you have at once to arrive at the conclusion that the word "children" has been used in some other or different sense; just as if the will had spoken of "the children of my late brother" or "the children of my late sister"; and if neither of those persons had been married, and they were then dead, and there was no possibility that they should ever marry, you would be driven necessarily to the conclusion that the only children that could be meant must be those whom the law would not otherwise allow to fall into that class, namely, illegitimate children. But, my Lords, I am at a loss to find in the outward circumstances in this case anything beyond the fact that this gentleman had by this lady illegitimate children to whom he was very partial, and whom he treated as his own children; but the fact that he had such children by no means shews us that he intended to provide for them in the will. Your Lordships may make your own conjecture upon the subject, but you are not at liberty, from anything that appears in his will, to infer that he meant anything other than that which the law says he has there done, namely, to make provision for the children of the marriage by the lady whom he is about to marry, or has just married—that is, for their "children" in the strict legal sense of that term. It is not because you find in the outward circumstances that there are some children whom you think he ought to have provided for, that the will must be taken to mean that they are to be provided for, when the words in the will can have full and complete effect given to them if you

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interpret them in another, and a legal, sense, without altering a single word. In this case the testator unfortunately (I use the word hypothetically, on the supposition that he intended to provide for these illegitimate children) has not used apt words in his will to give effect to that intention.

LORD O'HAGAN:—

I concur with my noble and learned friends. If we were free to speculate on the probable intentions of the testator, without reference to binding authority, and to carry them into effect, I might be disposed to decide against the Appellant. But the cases, which already have been sufficiently discussed, appear to me to compel a different conclusion. The word "children" *per se* points confessedly only to legitimate children; the operation of the law writes "legitimate" before it; and before the word so impliedly inserted can be elided or lose its effect, enough should appear on the face of the will to demonstrate conclusively that its bounty must be extended to another class of children. Whether this rule of construction be good or bad, and whether it might not advantageously undergo an alteration, may be matter for discussion; but it exists, and, considering the will before us, according to its requirements, I think the illegitimate children are incapable of taking under it. In *Harris* v. *Lloyd* (1) Lord *Eldon* said: "I have not the least doubt that this testator meant illegitimate children, but I am clearly of opinion that there is not enough upon the face of this will to authorize me to carry that intention into effect." And Lord *Loughborough* had said before, in *Cartwright* v. *Vawdry* (2): "This is a very unfortunate case. I have no doubt of the intention; but how can I possibly put upon the will the construction the Plaintiff desires when there are lawful children?" So here, though there may be ground for supposing the testator to have meant a benefit to all the offspring, there is no demonstration, on the face of the will, entitling us to carry out his purpose—as if he had designated them by their names, or pointed to a class comprehending them, unmistakeably and inevitably. On the contrary, as has been strongly argued, it is within the bounds of possibility that, in a will made after his marriage, and at a time when the coming of future children might

(1) T. & R. 310. (2) 5 Ves. 534

have been anticipated, he may have had regard to them, and provided otherwise for children already existing by some arrangement *dehors* the will. Such a supposition may not have the character of high probability, but it tends to harmonise the legal construction of the instrument with the conceivable purpose of the testator, and repels the conclusion that the terms necessarily imply an intention to employ the word "children" in a sense *primâ facie* unrecognised by law. I need add nothing farther to the ample reasoning by which the resolution proposed by my noble friend on the woolsack has been commended to your Lordships.

LORD SELBORNE :—

My Lords, I am by no means sure that the law would not be in a better state than it is at present if the word "children" in a will were regarded as large enough, when used concerning the children of the testator by a particular woman, to include, within its proper and *primâ facie* construction, any children living at the date of the will who might be recognised by the testator as being his own by that woman, as well as those who might afterwards be procreated between them in lawful marriage. But it is perfectly well settled, as the law now stands, that the word "children" in a will means legitimate children, unless, when the facts are ascertained and applied to the words of the will, some repugnancy or inconsistency (and not merely some violation of a moral obligation or of a probable intention) would result from so interpreting them. I find no ground upon which it can be held that any repugnancy or inconsistency would result from giving to the word "children," as used in the present will, its ordinary legal sense, and I therefore am compelled to concur in the judgment proposed by my noble and learned friend on the woolsack.

THE LORD CHANCELLOR:—My Lords, I have to ask your Lordships what you think we ought to do in this case with regard to the costs of the suit. It appears that in the Court below all parties got their costs, and there has been no intermediate hearing. The case has come to your Lordships direct from the Vice-Chancellor. It is impossible to say that it is a case in which the

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opinion of the Court would not require to be taken upon the construction of this will. The difficulty has been created by the testator, and the question concerns those who are closely related to one another. Under these circumstances I should submit to your Lordships that, if no ground (and none occurs to me) can be alleged against such a course, it would be expedient to say that the costs of all parties in this appeal should be paid out of the estate.

Mr. *Glasse*:—Will your Lordships allow me to say a word with regard to the costs of the Respondents?

THE LORD CHANCELLOR:—You mean the illegitimate children?

Mr. *Glasse*:—Would not your Lordships think it right that their costs in the Court below should be included? I am informed that they would not be included under the Vice-Chancellor's order.

THE LORD CHANCELLOR:—The costs of all parties in the Court below are ordered to be paid out of the estate.

The following Order was afterwards entered upon the Journals:—

Ordered, That the decree of the 20th of December, 1873, complained of in the appeal, be varied by the omission of the words "the testator has given to the Plaintiff power to appoint by will his real and personal estate among the Defendants *Charles Alexander Dorin* and *William James Alexander Dorin*, and that in default of such appointment such real and personal estates will, on the decease of the Plaintiff, go and belong to the said infant Defendants in equal shares absolutely: And it is Ordered, That the Plaintiff's bill do stand dismissed against the Defendant *Arthur Frederic Loch Dorin*," and by the insertion of the following declaration in lieu thereof; viz., It is Declared, That, according to the true construction of the will of the said testator, and in the events that have

happened, the real and personal estate of the testator is (subject to the life estate therein given to the Plaintiff *Margaret Christiana Dorin*) for her life, undisposed of by his will: And that the Plaintiff's bill do stand dismissed as against the said infant Defendants *Charles Alexander Dorin* and *William James Alexander Dorin:* And that, in addition to the inquiries directed under the decree, the following inquiry be made; viz., 1. An inquiry who at the death of the testator was his heir-at-law, and who were or was his next-of-kin, and the persons entitled as on intestacy to his personal estate: And that the Appellant's and Respondents' costs of this appeal as between solicitor and client, and also the costs of the Respondents *Charles Alexander Dorin* and *William James Alexander Dorin,* incurred in the prosecution of the said decree, as between solicitor and client, be paid by the Plaintiff (*Margaret Christiana Dorin*) the executrix, out of the *corpus* of the testator's estate, the amount of the costs of this appeal, as between solicitor and client, to be certified by the Clerk of the Parliaments, and the costs of the Respondents *Charles Alexander Dorin* and *William James Alexander Dorin,* incurred in the prosecution of the said decree, to be taxed by the Taxing Master of the Court of Chancery, as between solicitor and client: And it is also farther Ordered, That the said cause be and the same is hereby remitted back to the said Court of Chancery to do therein as shall be just, and consistent with this judgment.

Lords' Journals, 16th April, 1875.

Solicitors for the Appellant: *J. B. Batten.*

Solicitors for the Respondents: *Freshfields & Williams; Grover & Humphreys.*

1875
March 4, 5, 18.

MARIA WILLOCK . . . . . APPELLANT;

AND

WILLIAM NOBLE AND OTHERS . . . . . RESPONDENTS.

Will of Married Woman—Assent of Husband—Separate Property—Power of Appointment—Property bequeathed.

3 Ch D. 196
590.
6 P D 31.
9 Q B D 580

A married woman possesses under 1 Vict. c. 26, no greater or different power to make a will than she possessed before that statute. The 24th section of that statute does not, retroactively, operate to give effect to her will as to property which it was not in her power to dispose of at the time when the will was made.

Without the husband's knowledge of the contents of a will made by a married woman, the will cannot be said to be made with his assent.

If a married woman, with her husband's assent, makes a will of personalty, in which she has an expectant interest, but that interest does not actually vest in her until after her husband's death, she must, to give validity to her will, re-execute it after his death.

So also if her will affects property which, (by his will made some years before and never altered,) he had bequeathed to her absolutely.

Morwan v. *Thompson* (1) questioned.

A married woman was entitled to a sum of £3000 for her separate use; the income of a sum of £14,000 was settled upon her husband and herself for life, subject, as to the sum itself, to her appointment, if she should die before him. He had a large property of his own. In 1857 he made his will, by which he left all his property to his wife and made her sole executrix. He never altered that will. He assented to her making a will during the coverture, and, in July 1869, she made it in a form which affected to deal with all the three sorts of property; but there was no proof that he actually knew or had assented to its contents. He died in November, 1869. She, after his death, declared to her solicitor her adherence to her will, but she did not re-execute it. She died in January, 1870:—

Held, that her will only disposed of the property which belonged to her for her separate use; that as to the £14,000, her power of disposition had not arisen; that as to the property bequeathed by her husband, she had no power of disposition till after his death, and that her will could have no operation on that property, as it was made before her title to that property existed; that neither his assent, nor her subsequent declaration of adherence, had given validity to her will; and that in order to be valid and effectual it ought to have been duly re-executed after his death, as an original will is required to be executed under the statute.

THIS was an appeal against an order of Lord Chancellor *Selborne* and the Lords Justices, by which a decree of Vice-Chancellor *Bacon* had been reversed.

(1) 3 Hag. Ec. Rep. 239.

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In the year 1827 a marriage took place between *Henry Dawes*, of the *India* Civil Service, and *Maria Noble*, of *Cobham*. She was possessed of a sum of £3800 to her separate use. A marriage settlement was executed, by which, besides other property, two sums of £4000 and £10,300, then belonging to Miss *Noble*, were vested in trustees on trust to permit Mr. *Dawes* to receive the interest during his life, then to permit Mrs. *Dawes*, if she should survive her husband, to receive the income for her life, then for the children of the marriage, but in case there should be no child who should attain a vested interest then

"Upon trust for the said *Maria Noble*, her executors, &c., in case she shall survive the said *Henry Dawes*, her intended husband; but *if she shall die in his lifetime*, then from and after the decease of the said *Henry Dawes, upon trust for such person* or persons, for such interest or interests, and for such intents and purposes, and under and subject to such charges, powers, and provisoes as she, the said *Maria Noble, notwithstanding her coverture, by her last will and testament in writing*, in the nature of, or purporting to be, her last will and testament, or any codicil or codicils thereto, to be *signed and published by her in the presence of two or more credible witnesses, shall, at any time* or times *after the solemnization of the said intended marriage direct or appoint, and in default of* and until *such* direction or *appointment*, and as to such part or parts of the premises of which no such direction or appointment shall be made, or as to the estate or interest in the premises, or any part or parts thereof, to which no such direction or appointment shall extend, upon trust from and after the decease of the said *Henry Dawes, for such person or persons as* under or *by* virtue of *the statute for the distribution of intestates' effects* should or *would* at the time of the decease of the said *Maria Noble have been entitled to her personal estate as her next of kin in case she had died intestate and unmarried.*"

The marriage took place, but there never was any issue of it. Mr. *Dawes* made his will on the 18th of August, 1857, gave all his real and personal estate to his wife, and appointed her sole executrix. Mrs. *Dawes* and her husband were much attached to each other, and she made her will in his lifetime, on the 20th of July, 1869. They went together to the solicitor's, but he remained

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in the carriage while she went into the solicitor's office for the purpose of executing the will. He knew of the purpose of her visit, and assented to it; but there was no evidence to shew that he actually knew the contents of her will. He died on the 17th of November, 1869. The wills of Mr. and of Mrs. *Dawes* were never altered. After her husband's death she sometimes made her will the subject of conversation with the solicitor, and verbally declared her adherence to it, but she never formally re-executed or re-published it.

Mrs. *Dawes'* will began by describing herself as the wife of *Henry Dawes*, and it went on thus: "Whereas I am entitled as my separate property to a sum of £3822 11*s.* 11*d.* Consolidated £3 per Cent. Annuities standing in my name as the wife of the said *Henry Dawes*, &c. Now in exercise of every right enabling me in this behalf I hereby appoint" the same to her executor and executrix on the trusts thereinafter mentioned. She then recited her title under her father's will to an estate of freehold in *Westmoreland*, which she devised to her husband for his life, and the will proceeded: "And whereas under the settlement made on my marriage with my said husband I have a general power of disposition after the death of my husband in the event, which has happened, of there being no child of the marriage over a sum of £14,000 thereby settled, and which is now secured on an estate at *Highbury*, &c. Now in exercise of the said power, and of every other power enabling me in this behalf, I do hereby appoint and bequeath the said sum of £14,000 to my executor and executrix hereinafter named, subject to the interest therein of my said husband for his life, upon trust that they shall stand possessed of the said sum of £14,000, and the income thereof," for legacies and annuities; and then, after specifying these legacies and annuities, the will proceeded thus: "And as to all the residue of my real and personal estate which I shall possess, or have power to dispose of at the time of my decease, I appoint, devise, and bequeath the same, subject as aforesaid, unto my said niece, *Maria Willock*, spinster, for her absolute use and benefit." *Maria Willock* was the niece of Mr. *Dawes*, was very intimate with him and his wife, and was frequently staying at their house. Mrs. *Dawes* died a few weeks after her husband. *Maria Willock* and a Mr. *Phelps*

were appointed executrix and executor of Mrs. *Dawes'* will. When the will was propounded for probate, a caveat was entered by *William Noble*, as one of the next of kin of Mrs. *Dawes*.

Maria Willock and Mr. *Phelps* delivered a declaration in the suit, in which they alleged that the will was executed on the 20th of July, 1869, that *Maria Dawes* was then the wife of *Henry Dawes*, who assented to the will, and to the dispositions therein contained, and never recalled his assent thereto; that after his death she expressed her adherence to the will and re-published it; that it was never revoked by her; and they insisted that it was operative to pass all her real and personal estate at the time of her death.

Noble filed several pleas in answer to this declaration, admitting the execution of the will, but denying the other allegations of fact therein contained, and insisting that though it might have been assented to by *Henry Dawes* during his life, his death rendered such assent void, and he denied the validity of the will to pass the property therein contained, except such as had belonged to *Maria Dawes* as for her separate use.

The cause was heard before Lord *Penzance*, who, on the 9th of May, 1871, pronounced for the will, and found that the sum of £3822 11*s.* 11*d.* was the separate property of *Maria Dawes*, and was well disposed of by her will; that her husband assented to her making a will, and knew that she had made the will; that it was not proved that the husband knew of its contents, and that *Maria Dawes*, after she became a widow, intended to adhere to the will, and that it should have effect and operation as her will.

On the 4th of August, 1871, his Lordship granted probate limited to the administration of all such personal estate as she, the said *Maria Dawes*, by virtue of the powers and authorities, if any, given to or vested in her by the settlement of the 27th of April, 1827, or by virtue of all and every other powers and authorities, or by virtue of any law or statute her in any way enabling, had power to appoint or dispose of by her will, and had by her will appointed and disposed of accordingly, but no farther or otherwise (1).

His Lordship also made a grant of administration *cæterorum* to

(1) *Nom. Noble* v. *Phelps and Willock*, Law Rep. 2 P. & D. 276.

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Noble, in order to enable him, if necessary, to raise the question on the validity of the will in the Court of Chancery.

Noble and the other next of kin filed their bill in Chancery on the 31st of October, 1871, against the Appellant *Maria Willock* and other necessary parties, and thereby prayed for declarations that the general personal estate of Mrs. *Dawes* (other than her separate estate of £3822 11*s.* 11*d.*) and the £14,000 were undisposed of. Answers were put in, the evidence given in the Probate Court was taken as read, and the cause was heard before Vice-Chancellor *Bacon*, who, on the 30th of January, 1873, made a decree dismissing the bill with costs. The case was re-heard, on appeal, by Lord Chancellor *Selborne* and the Lords Justices, who ordered the decree of Vice-Chancellor *Bacon* to be discharged, and granted the relief prayed by the bill (1).

This appeal was then brought.

Mr. *E. E. Kay*, Q.C., and Mr. *Chitty*, Q.C. (Mr. *A. T. Watson* was with them), for the Appellant:—

The effect of the 24th section of the *Wills Act* (1 Vict. c. 26) is to pass all the personal property which a testator may possess or be entitled to at the time of death. That provision must be extended to the case of the will of a married woman possessing the power to make a will. So that, if she made a will as to property which at the date of the will she had not the power to dispose of, but she afterwards acquired the power to dispose of, her will would be effectual as to that property. And by the 27th section of the *Wills Act* a general disposition of property affects all that a testator has the power to dispose of. There is a general disposition here, and the will speaks from the time of the death of the testatrix. The words of this will are exactly adapted to the provisions of the statute. The will describes the two circumstances which, under the settlement, gave her the right of disposition, namely, the death of her husband and the absence of children, and the will itself must be taken as if made when she had full power to dispose of the property. In every way the will must be treated as valid to affect all the property to which she had become entitled before her own death. It therefore affected the property bequeathed by her husband and

(1) Law Rep. 8 Ch. App. 778.

(2) See W.N. (1873) 28.

the settled property, the £14,300. So far as the terms of the settlement and of the will were concerned, her right and power were complete, and the validity of the will itself was undoubted. But then it was said that she had not by law the power to do what she had done. There was no force in that objection. The 8th section of the *Wills Act* said that a married woman should only have such power to dispose by will as she possessed before the passing of that Act. What was that power? She could not dispose of land: she was forbidden to do that by statute of *Henry* VIII., but that was the only statutory restriction upon her. The reason why she could not dispose of personal property, except such as was specially made subject to her separate use, or specially subjected to her power of appointment, was that the law assumed all her personal property to belong to her husband; and so there was nothing on which her will could operate. But if her husband gave his assent to her making her will as to any property as to which he had a title, she could do so, and her will would be operative. That had happened here. The husband had given his assent to her making a will, he accompanied her to the solicitor when she made it, and though it was not absolutely proved that he distinctly knew of the contents of the will, there could be no rational doubt that he did so, and approved of them; his own niece, who was on terms of the greatest intimacy with both husband and wife, being the favoured legatee. The wife's will was made not long before his death, and he never expressed any objection to it, but shewed his entire reliance on and agreement with his wife by leaving unaltered a will which, twelve years before that time, he had made in her favour, giving her everything he possessed. The evidence as to his assent was complete.

Putting the 24th and the 27th sections of the *Wills Act* together, it is clear that this will must be construed as speaking from the death of the testatrix, and as she then had full power to dispose of all the subjects mentioned in it, it must also be treated as operating as a general appointment upon all the property over which, at the time of her death, she had the right of disposition. That was all the property possessed by her in her own separate right, or through the settlement, or under the will of her husband

Her will itself, duly executed, was not questioned as to the separate

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property. To that extent it was undoubtedly a good will; it was valid when made. But if it was a good will, then the only question that could be raised upon it was one of construction; whether it so described the property and the persons mentioned in it as to constitute an effective disposition of that property to those persons? There could be no doubt that it did so, because, being valid when made, containing a general disposition of the property, and speaking from the time of the death of the testatrix, it must have effect over all the property as to which she, at her death, possessed a disposing power, whether by way of appointment or will.

Then as to republication: If that is necessary in a case of this kind, there is sufficient proof on that subject. It is in evidence here that the testatrix, after her husband's death, consulted her solicitor, and declared to him that she adhered to the will she had made. That sufficiently validates the will, for there is nothing in the statute which requires a particular form of publication, or even requires republication. And yet the statute clearly contemplated the case of a will made long before death, and expressly enacted that such a will should be taken to speak as from the time of the death. The statute, therefore, contemplated changes in circumstances and in property between the time of making the will and the time of death; and still, though such changes might occur, it did not require republication.

[*Swinburne* on Wills (1), *Morwan* v. *Thompson* (2), *Stevens* v. *Bagwell* (3), *Scammell* v. *Wilkinson* (4), *Thomas* v. *Jones* (5), *Price* v. *Parker* (6), *Miller* v. *Brown* (7), *Duke of Marlborough* v. *Godolphin* (8), *Hodsden* v. *Lloyd* (9), *Dingwell* v. *Askew* (10), and *Clough* v. *Clough* (11), were referred to.]

Mr. *Fry*, Q.C., and Mr. *Jackson*, Q.C. (Mr. *Bevir* was with them), for the Respondents:—

It cannot be denied that under the old law no married woman

(1) Part 2, s. 9.
(2) 3 Hag. Ec. Rep. 239.
(3) 15 Ves. 139.
(4) 2 East, 552.
(5) 2 J. & H. 468; on appeal, 1 De G. J. & S. 63.
(6) 16 Sim. 198; 17 L. J. (Ch.) 398.
(7) 2 Hag. Ec. Rep. 209.
(8) 1 Ves. 61.
(9) 2 Bro. C. C. 534.
(10) 1 Cox, 427.
(11) 3 My. & K. 296.

could make a will of personalty not settled to her separate use without her husband's assent. That assent was required to the extent, not only of making the will, but to that of agreeing to its contents. There is no evidence of any such assent in this case. There is no proof of more than that the husband assented to his wife making some will; there is nothing whatever to shew that he was aware of its contents and assented to them. On that part of the case, therefore, the claim of the Appellant must fail. And as to the settled property, it is clear that no power to dispose of it arose to the wife, as she did not die before her husband.

Then as to the validity of the will under the statute, 1 Vict. c. 26: That statute gave the wife no new power to make a will; it declared, and that, too, in negative terms (sect. 8), that "no will made by a married woman shall be valid, except such a will as might have been made by a married woman before the passing of this Act." Her capacity to make a will was therefore in no way enlarged, it remained precisely as before, and all the old restrictions were still applicable. First of all the assent of the husband was necessary. Here there had not been the proper assent of the husband, for it only extended to the making of a will, but not to the making of this will, and consequently the only property on which Mrs. *Dawes's* will could operate was that which belonged to her for her separate use, and over which she had a disposing power as if she had been an unmarried woman. She could not dispose of property in which, at that moment, her husband had a clear and settled interest, for even if he gave his assent to such a disposition of it, he might afterwards revoke his assent and then her will would be valueless; neither could she dispose, by anticipation, of property absolutely belonging to him, and to which she could only become entitled by the provisions of his will, and over which, therefore, she could have no disposing power till after his death. She could only do these things by a will duly executed after his death and when the property had become legally vested in her. The mere declaration that she adhered to a will made during coverture, in anticipation of what she might become entitled to, could not have the effect of a disposition made after his death, and could not make valid and operative a will which, till after her coverture had ceased, was invalid and inoperative. She must

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formally republish and re-execute her will, and the only effectual way to do that was to execute it as an original will executed under the terms of the *Wills Act*. It is true that the statute may be taken to have contemplated additions to and changes in the property of a testator, but has not required him, in terms, to republish his will. But that only applies to cases where the property has been validly disposed of by the will when made. As to such wills, but as to such alone, they are made to speak from the time of the testator's death. Here that was not the case. The only property validly disposed of was the separate estate of the wife; the property which required the husband's assent was not so disposed of, nor was the property which was entirely his, and which he bequeathed to his wife by his will. As to these sorts of property the will required to be executed after the death of the husband and in the form provided by the statute.

[*Blackstone* (1), *Burn* (2), *Sugden* on Powers (3), *Henley* v. *Philips* (4), *In the Goods of Rebecca Smith* (5), *Anonymous* (6), *Price* v. *Parker* (7), and *Trimmell* v. *Fell* (8) were cited, and the authorities referred to on the other side were commented on.]

Mr. *Kay* replied :—

It was not the intention of the statute that in such a case as this formal re-execution of the will should be required.

1875
March 18.

THE LORD CHANCELLOR (Lord *Cairns*) :—

My Lords, this appeal was heard by your Lordships some time since, when your Lordships had every assistance in considering the case which could be rendered by the most able arguments on behalf of the Appellant and of the Respondents.

My Lords, the question raised by this appeal is as to what property of Mrs. *Dawes*, a widow who died on the 2nd of January, 1870, passed under a will made by her while she was a married woman.

Mrs. *Dawes* had property of various kinds at her death. She

(1) Book II. c. 23.
(2) Ecc. Law tit. "Wills."
(3) 8th ed. ch. 7, s. 7.
(4) 2 Atk. 49.
(5) 27 L. J. (P. & D.) 39.
(6) 1 Mod. 211.
(7) 1 Sim. 198.
(8) 16 Beav. 537.

was entitled to £3822 11*s.* 11*d.* Consols standing in her name for her separate use, and it is admitted that this was well bequeathed by and passed under her will. She was farther entitled to a fee simple estate which she had a power of appointing, and it is admitted as to this also that it was effectually appointed or devised by her will. Beyond this there were two sums amounting to £14,300, which, by Mrs. *Dawes*' marriage settlement, were settled upon trust for Mrs. *Dawes* absolutely, if she should survive *Henry Dawes*, her husband; but if she should die in his lifetime, then after the decease of *Henry Dawes* for such persons as Mrs. *Dawes*, notwithstanding her coverture, should by her last will and testament appoint, and in default of appointment, for her next of kin. This fund she professed to appoint by her will; but inasmuch as the power was only to meet the case of her dying in the lifetime of her husband, it is clear that the power never arose, and her will, as an exercise of the power, could not be effectual. At the time of her death, however, she was, under the terms of the settlement which I have read, entitled to this fund as her absolute property, and she was farther entitled to considerable property which had been left to her by her husband. Now in her will, already made by her during her coverture, is contained a residuary clause in these words: "And as to all the residue of my real and personal estate which I shall possess or have power to dispose of at the time of my decease, I appoint, devise, and bequeath the same, subject as aforesaid, unto my said niece *Maria Willock*, spinster, for her absolute use and benefit." And the question is whether this residuary gift, made during coverture, was effectual to dispose of the £14,300 and of the property which came to her from her husband. The Court of Appeal in Chancery has decided in the negative, and in that decision I entirely concur.

Before the *Wills Act* a married woman was, as a general rule, incapable of making a will. Her will of land was declared void by statute. Her will of personalty was equally invalid, not merely because marriage was a gift of her personalty to her husband, but because in the eye of the law the wife had no existence separate from her husband, and no separate disposing or contracting power. On this general rule some modifications were engrafted. A married woman who was an executrix had, as such, power to

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make a will and to appoint an executor for the purpose of continuing the representation to the original testator; a married woman might make a will with the consent of her husband; a married woman might make a will in the exercise of a power; and a married woman might make a will disposing of her separate estate or its savings.

In this state of things the *Wills Act* was passed, and it provided by sect. 8 that no will made by any married woman should be valid except such a will as might have been made by a married woman before the passing of the Act. This section appears to me to have left the capacity of a married woman to make a will exactly as it stood before the Act. It confers no new capacity to make a will. Where the will of a married woman would have been valid before the Act it leaves it valid still, provided the formalities prescribed by the Act are complied with; and in such case, to use the words of Lord *Westbury* in *Thomas* v. *Jones* (1), "the married woman acquires no enlarged capacity from the statute, although her testamentary instrument or will, when made, may have the benefit of more liberal rules of interpretation."

Applying these observations to the present case, under what class of testamentary dispositions competent to a married woman before the *Wills Act* is the present will to be brought? I put aside the case of a will by a married woman executrix as inapplicable. Is it a will by a married woman disposing of her separate estate? But so far as it disposes of separate estate, effect has been given to it, and no question arises. Is it a will made in exercise of a power? I have already said that, Mrs. *Dawes* having survived her husband, the power never arose; and for this, if authority is wanting, the cases of *Price* v. *Parker* (2), and *Trimmell* v. *Fell* (3), are authorities. Is it a will made with consent of her husband? It is found as a fact in the case, that although her husband assented to Mrs. *Dawes* making a will, and knew she had made a will, it is not proved that he knew the contents of the will. But without a knowledge of the contents of the will, the will could not be said to be made with the husband's assent; for an assent to making a will, or knowledge that a will had been made, would be

(1) 1 De G. J. & S. 82. (2) 1 Sim. 198.
(3) 16 Beav. 537.

quite consistent with the belief of the husband that the will was a disposition of separate property, or the execution of a power, neither of which acts he could have objected to. But, moreover, it is to be observed that Mr. *Dawes*, the husband, died before his wife, and it is in reality the sanction of a husband surviving his wife, given to her will by withdrawing his claim to administration, which gives validity to her will, and where he does not survive her, her personal property in possession would be accounted as his property, and would pass to his representative.

I arrive, therefore, my Lords, at the conclusion that the will of Mrs. *Dawes* in this case is efficacious only as a disposition of her separate property, and that the trust fund of £14,300, and the property which she acquired under her husband's will, are not included in or disposed of by her will.

My Lords, it was suggested that Mrs. *Dawes* after she became a widow intended to adhere to her will, and intended that the same should operate and have effect as her last will and testament, and it was suggested that by this doctrine of adherence some greater effect might be given to her will. But, whatever may have been the view taken of this doctrine before the *Wills Act*, as to personalty, it is clear it can have no application since the Act, and that nothing can give fresh efficacy, after coverture, to the will of a married woman made during coverture, short of a republication of the will.

I have only to add, my Lords, that two cases were referred to which were supposed to shew that the will of a married woman might have some greater force than that which I have assigned to it, and in particular that it might carry property acquired by her after the marriage. One of these, reported as *Scammell* v. *Wilkinson* (1), and again under the name of *Stevens* v. *Bagwell* (2) has been so fully examined and explained by the Lord Chancellor on the hearing of the present case in the Court of Appeal in Chancery, that I do not think it necessary to repeat his observations upon it.

With regard to the other case of *Morwan* v. *Thompson* (3), I observe that this was a cause of proving the will of Mrs. *Robinson*. The will was dated on the 27th of June, 1807, and was made

(1) 2 East, 552. (2) 15 Ves. 139.
(3) 3 Hag. Ec. Rep. 239.

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during coverture, in virtue of certain powers vested in her under a bond, executed by her husband in contemplation of marriage. The will contained no appointment of executor nor residuary legatee; and was not republished after the husband's death; it was propounded by a legatee and opposed by a second cousin, one of the next of kin. The substance of the allegation is set forth in the judgment. The judgment states: "This allegation pleads in substance that *Dorothy Robinson* the deceased married in 1785 *William Robinson*, who died in 1819; she survived her husband about a year, and died on the 18th of February, 1820, leaving some second cousins, of whom *Robert Morwan* is one; that a settlement was executed before her marriage, giving her the power to dispose of £700. This settlement is in effect that 'if the wife dies before the husband the sum of £700 is to be paid, on his death, to such persons as she by will, notwithstanding coverture, shall direct: if she survives him then the £700 are to be paid to her to be disposed of at her will and pleasure.' So that there were two events contemplated—in the one, of her husband's surviving, she might dispose of this money by will; in the other, of her surviving him, the money would become her property absolutely. The allegation farther pleads 'that the deceased intending to dispose of all property to which she was entitled under the bond of her husband dated the 4th of April, 1785, and of all other estate and effects over which she had a power of disposition, executed a will on the 27th of June, 1807.' By that will she provided for the disposition of this money after the death of her husband: she gave him the £700 for life, but after his death she bequeathed over certain legacies. The allegation then proceeds 'that her husband by his will dated in April, 1816,'" (that was nine years after the wife's will) "added to his wife's provision by directing that the annuity of £25 secured to her by marriage settlement was to be increased to £50 ('as she has disposed of her principal money by the will') to be paid from the time of his decease to his daughter *Alice* and her husband for the maintenance of the deceased if she continues to reside with them, or more at the discretion of his trustees.'"

My Lords, before I proceed to read to your Lordships the main part of the judgment, which is very short, I pause for the purpose

of saying that the ultimate determination of that case was this. It is given in a note at the end: "It having been agreed between the parties that the case should be determined by the admission or rejection of the allegation the suit here dropped," that is to say, as a contentious suit it dropped, "and administration (with the will annexed) limited to the property of which the deceased had a right to dispose, and had disposed of by her will." That is the form of the administration. Although I am going to read the remainder of the judgment, I will ask your Lordships to observe that anything that was there said was extra-judicial, because, the administration being limited to the property which the deceased had a right to dispose of by her will, the question of what she had a right to dispose of by her will would fall to be determined, not in an Ecclesiastical Court, but elsewhere, and therefore in point of fact could not be determined by anything that was done in that suit.

The learned Judge continues: "Here, then, the husband provides for his wife, the deceased, surviving him; he recognises her will as having disposed of the £700, and he seems to refer to what is pleaded to have been her then state of incapacity, for the allegation sets forth 'that the deceased for several years before the death of her husband was in a state of imbecility, and was incapable of recognising the will after his death.' Why, then, is the fact, that she survived her husband, to revoke that will? There is no change of condition; she was testable when she made the will and when she died, both under the settlement and under her husband's will." Now, my Lords, if those expressions are correctly reported, there is in them very serious error. Testable under the settlement she clearly was not, in the absolute sense of the term. She had a power under the settlement, but a power arising only in one event—in the event of her dying before her husband. In that event she had the power given to her (just as in the present case) of disposing of the £700 appointed by her will. Testable under her husband's will she undoubtedly could not have been; because her own will was made nine years before her husband's. The expressions, therefore, may possibly be inaccurately reported, but if accurately reported, are themselves entirely inaccurate. "She was testable when she made the will

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and when she died, both under the settlement and under her husband's will, there is no alteration of circumstances from which an intention to revoke can be presumed. She has provided for the death of her husband; it is in the event of his death that the legacies are given. In his lifetime she had the power of disposing of the £700 notwithstanding coverture" (that was a power only to take effect if she predeceased her husband) "on her surviving him the sum of £700 was absolutely vested in her and became her property disposable at her pleasure, and her will having disposed of it in the event of the husband's death, I can see no reason nor principle why the will should become invalid or be revoked. There is no rule of law of which I am aware that holds a will validly made during coverture to become invalid merely by reason of the husband's death." Of course if it is validly made during coverture it would not become invalid merely by reason of the husband's death. The words "validly made" assume the whole question. The learned Judge goes on thus: "The case of *Stevens* v. *Bagwell* (1) cited in the argument for the next of kin is, as far as it goes, directly the other way, for there the will was made during coverture, and the husband died before the wife, yet the will was valid." My Lords, as I have said, I will not go into the case of *Stevens* v. *Bagwell* (1), for it is fully explained in the judgment of the Lord Chancellor, in the Court below, how entirely inapplicable that case is to establish such a proposition. Finally the learned Judge is reported as saying: "Where a will is made before marriage, and the wife survives the husband, in order to render such a will valid, there must be something of a republication, because there the intermediate marriage has revoked the will, and has transferred all the property. That is an intelligible principle. So a will made during coverture, where there is no power under settlement to make a will, but a mere revocable assent on the part of the husband to her disposing of her chattels real or *choses in action*, and property acquired after his death, may require something in the nature of a republication, because she was not testable when the will was made, and she could derive no power from him beyond the extent of his interest in the effects of which her will purports to dispose; but in the present case I can see no principle or pre-

(1) 15 Ves. 139.

sumption of law on which this will was revoked, and on the ground already stated I am of opinion that it remained valid after the husband's death, and I therefore admit the allegation."

My Lords, if that is to be taken as an authority, upon those loose or loosely reported expressions, which I have read, any married woman who, during coverture, has a power which she may validly exercise, but a power to arise and take effect only in the event of her dying before her husband, and pretends to exercise that power, may have it said afterwards that because she did so, owing to the contingency I have mentioned, she was therefore to all intents and purposes testable, and could make a will which would carry property belonging to her after marriage: I can only say that I must express a respectful dissent from that proposition; but I cannot believe that that was meant to be laid down by the learned Judge, and certainly the administration granted was limited to that which she could validly dispose of as a married woman, and no question of the kind supposed was actually decided.

My Lords, I am of opinion that the decision of the Court of Appeal in Chancery in this case was correct, and I move your Lordships that the appeal be dismissed with costs.

LORD CHELMSFORD:—

My Lords, the question to be determined upon this appeal is whether, upon the true construction of the *Wills Act* (1 Vict. c. 26) the will of Mrs. *Dawes*, executed during her coverture, was effectual to pass personal property which came to her under her husband's will. Mrs. *Dawes* was entitled to a sum of £3822 11*s.* 11*d.*, admitted to be her separate property, upon which of course no question arises. By her marriage settlement she had, in the event of her dying in her husband's lifetime, a general power of appointment over a sum of £14,300. Mr. *Dawes*, the husband, died 17th November, 1869, having by his will, made so long before as 1857, given all his real and personal estate to his wife absolutely, and appointed her sole executrix.

Mrs. *Dawes*, by her will, made in July, 1869 (a few months before her husband's death), after referring to her power of appointment of the £14,300, and charging certain legacies upon it, appointed, devised, and bequeathed the residue of her real and

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personal estate to the Appellant, her husband's niece. Vice-Chancellor *Bacon* held that upon the proper construction of the *Wills Act*, the will of Mrs. *Dawes* was valid, and operative to pass the whole of her personal estate. The Lord Chancellor and the Lords Justices reversed this decree, and held that the general personal estate of Mrs. *Dawes* was not effectually disposed of by her will, and that it was distributable amongst her next of kin.

In the consideration of the question it is necessary to bear in mind what was the testamentary capacity of a married woman before the passing of the *Wills Act*. The learned counsel for the Appellant said that the disability of a married woman to make a will existed only with respect to real estate, by reason of the Statute of *Henry* VIII., that as to personal estate a married woman was never incapacitated from making a will, nor was a will made by her invalid, but it was inoperative, because on the marriage her personal estate became the property of her husband, and left her nothing to dispose of. I do not think it necessary in this case to examine critically whether it is from want of power or want of property that a married woman is unable to make an operative will. Her disability, and the grounds of it, are thus stated in *Williams* on Executors (1): "With us a married woman is not only utterly incapable of devising lands (being excepted out of the *Statute of Wills*, 34 & 35 Hen. 8, chap. 5), but also she is incapable of making a testament of chattels without the licence of her husband, and such a will being considered a mere nullity, will not be admitted to probate in the Probate Court."

A married woman, however, is capable of making a will with respect to personal property settled to her separate use, or over which she has a power of appointment, or when the will is made with the assent of her husband. In these cases where the married woman has a disposing power notwithstanding her coverture, there is no difference in the operation of her will from that of an unmarried woman. The will of neither of them can pass after-acquired real estate, but the wills of both extend to personal estate coming to them afterwards down to the time of her death.

The will of Mrs. *Dawes* was said to have been made with her husband's assent. Vice-Chancellor *Bacon* thought the assent was

(1) 6th ed. vol. i. p. 51.

clearly established, and laid considerable stress upon the fact. Lord *Penzance*, in the Probate Court, said that "the evidence in the case satisfied him that the husband gave a general assent to his wife's making a will." I agree with the observation of Lord *Selborne* in the present case, that Lord *Penzance's* opinion was founded on very slender evidence, if there was any evidence at all. But Lord *Penzance* dismisses the question of the husband's assent with these observations: "It is needless to inquire how far this state of facts would have affected the validity of her will if he had survived her, for he died first, and this event appears to me, according to the authorities on the subject, to have extinguished, once for all, whatever support, authority, or efficiency his wife's will might have derived from his concurrence." I think it right to say that if it had been necessary to decide upon the assent assumed to have been given by Mr. *Dawes*, I should have had no difficulty in holding, upon the authorities, that a general assent to a wife's making a will is not sufficient, but that the husband's assent ought to be proved to the particular will which his wife has made.

It was argued on behalf of the Appellant, upon the objection taken that Mrs. *Dawes'* will could not take effect without a republication, that if necessary (which was denied) her recognition of the will after her husband's death amounted to a republication. But if the validity of the will depended upon her husband's assent, and, as already shewn, his dying in her lifetime prevented that assent from having any efficiency, Mrs. *Dawes* could not have given new life to the will without a republication, and that could not be without an execution of it with all the formalities required by law.

These preliminary questions being disposed of, we come to the consideration of the effect of the provisions of the *Wills Act* upon Mrs. *Dawes'* will. The 3rd section of the Act enacts in the most general terms that it shall be lawful for every person to dispose by will of all real and personal estate which he shall be entitled to at the time of his death. This section if not afterwards restricted would have enabled infants and married women to make wills of their property to the same extent as persons not under disability. Therefore the 7th and 8th sections were added; the 7th section

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making the wills of persons under twenty-one years invalid; the 8th, in the form of a proviso, enacting "that no will made by any married woman shall be valid except such a will as might have been made by a married woman before the passing of this Act." This section has neither an enabling nor a disabling effect. It leaves the married woman exactly in the same state of testamentary capacity or incapacity in which she stood before the passing of the Act.

But the counsel for the Appellant, admitting this, argued that if the testamentary capacity once exists and is exercised over any property, however small, which a married woman has power to dispose of by will, and in her will she uses general words of disposition, they will be sufficient to pass property to any extent over which if it stood alone she would have had no testamentary power. Vice-Chancellor *Bacon* was of this opinion. For assuming that Mrs. *Dawes*, by the assent of her husband, was, within the very words of the 8th section, of full testamentary capacity, he went on to say: "It cannot be successfully contended that because by the happening of subsequent accidents the will comprehends larger interests or more extensive property than the testatrix was possessed of at the date of her will, its validity can be impeached, or its effects abridged." But, with submission, this seems to me to be begging the question, and to be directly opposed, not only to the meaning and effect of the 8th section, but to the language of the Vice-Chancellor himself in another part of his judgment, where he says: "It is said on the part of the Plaintiff, and I think correctly, that the statute does not in any respect add to or increase the testamentary capacity which a woman under coverture possessed before the statute."

The counsel for the Appellant argued that whatever the proper construction of the 8th section may be, the 24th section of the Act renders the will of Mrs. *Dawes* valid as to the property acquired by her after her husband's death, and that too without republication of her will. The 24th section enacts "that every will shall be construed, with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will."

The words of the section, it will be observed, are not that every will of real and personal estate shall speak and take effect as if it had been executed immediately before the death of the testator, but that every will shall, "*as to the estate comprised in it*," so speak and take effect. In construing this section it is only necessary to remember what estate could be comprised in the will of a married woman before the Act, as by the 8th section nothing more can be the subject of her will under the Act. Her capacity to make a will was limited (as we have seen) to her separate estate, her appointment under a power, and property which her husband has assented to her disposing of by will. To a will dealing with the estate of a married woman under any of these conditions the 24th section is applicable. But it cannot have any effect upon the estate, whether real or personal, which the married woman does not acquire, and consequently has no power to dispose of until after the coverture.

On behalf of the Appellant several cases were cited which were said to have decided that a will of a married woman was effectual to pass property acquired after the coverture. I will notice only one or two of these decisions.

The case of *Morwan* v. *Thompson* (1) was relied upon as an authority in favour of the Appellant. It must be observed that that was a case of proving a will in which the office of the Judge did not extend to its construction. In that case a married woman, if she died before her husband, had a power of appointment over a sum of £700 and if she survived him the £700 were to be paid to her absolutely. She made a will during coverture by which she disposed of the £700 to which she became entitled upon surviving her husband. She did survive him. Sir *John Nicholl*, upon granting probate of the will, said: "Her will having disposed of the £700 in the event of her husband's death, I can see no reason nor principle why the will should become invalid or revoked. There is no rule of law of which I am aware that holds a will validly made during coverture to become invalid merely by reason of the husband's death." The learned Judge here not only assumes the validity of the will of a married woman, but also its being effec-

(1) 3 Hag. Ec. Rep. 239.

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tual to dispose of property acquired upon her husband's death, in which he is clearly mistaken; and then, evidently misapprehending the case of *Stevens* v. *Bagwell* (1), he goes on to say: "The case of *Stevens* v. *Bagwell* cited in the argument for the next of kin is, as far as it goes, directly the other way, for there the will was made during coverture, and the husband died before the wife; yet the will was valid." The opinion of the learned Judge was never submitted to a Court of construction, for the case ended by agreement. I am bound to say that in my opinion it is not a decision which can be relied upon.

The cases of *Scammell* v. *Wilkinson* (2) and *Stevens* v. *Bagwell* (1) upon examination will be found not to be authorities in favour of the Appellant. No question arose in those cases as to the effect of Mrs. *Pearce's* will, made during coverture, with the approbation of her husband, upon property which she acquired under his will, she having survived him a few hours. The probate granted was limited "to all the right, title, and interest in or to the residue which by the will of her husband, Mrs. *Pearce* had a power to dispose of, and had disposed of accordingly." The probate appears not to have been a contentious one, and to have proceeded upon the ground of a valid will made by a married woman in exercise of a power. The personal representatives of Mrs. *Pearce*, thinking the probate too limited, applied to the Prerogative Court to revoke it, and to grant to them a general probate of Mrs. *Pearce's* will. Upon this an application was made to the Queen's Bench for a prohibition. The declaration in prohibition admitted that the limited probate had been properly granted, but alleged that the assent of *Pearce* to his wife's will was valid only as to such estate and effects as, by virtue of the will and testament of her husband, she had a power to dispose of.

The case, therefore, is no authority for the proposition that a will made by a wife with her husband's assent during coverture, will pass property acquired after the coverture. But the issuing of a prohibition against the grant of a general probate is, as far as it goes, a judgment against the efficacy of Mrs. *Pearce's* will over any other property than that which it was not disputed to possess

(1) 15 Ves. 139. (2) 2 East, 552.

by virtue of the will of her husband. There was no question at all raised as to property acquired by Mrs. *Pearce* after the coverture, but only as to her share of the residuary estate of her brother *Stevens*, who died during the coverture.

The case of *Stevens* v. *Bagwell* (1), also, has no application to the question of the effect of Mrs. *Dawes'* will. Sir *William Grant* had merely to decide who were the persons entitled under the bequest of the residue in the will of *Stevens*, Mrs. *Pearce's* brother? He was of opinion that her will had no operation whatever except to pass what she took under her husband's will (which, it may be observed in passing, had never been disputed), "and to transmit the representation as *Stevens'* executrix to her own executors."

It appears upon a careful examination of these two last-mentioned cases that they have no direct bearing upon the question raised by this appeal, but as far as the opinions of the Judges go they are adverse to the Appellant's case.

The last case cited by the Appellant which I shall notice is that of *Thomas* v. *Jones* (2). Nothing was there decided as to the validity or effect of a married woman's will, but the case turned entirely upon a question of the due execution by a married woman of a power of appointment.

By the will of *Sarah Davies* a general power of appointment by deed or will was given to the survivor of three persons, of whom Mrs. *Nicholl* was one. By her will made during coverture, and when one other of the three persons to whom the power was given was still alive, she gave all the rest, residue, and remainder of her real and personal estate among her children with limitations over. Mrs. *Nicholl* became the survivor of the three persons to whom the power was given, and died in the lifetime of her husband. It was held by the Vice-Chancellor, now my noble and learned friend near me (Lord *Hatherley*) and afterwards by Lord *Westbury*, that the 24th section of the *Wills Act*, having in the case of the exercise of a power of appointment by will of a married woman, made the will take effect as if executed immediately before the death, and the 27th section having made a devise or bequest of real or personal estate described in a general manner to operate as a due

(1) 15 Ves. 139.

(2) 2 J. & H. 468; 1 De G. J. & S. 63.

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execution of a general power of appointment, therefore, although Mrs. *Nicholl* at the time of making her will was not the survivor of those on whom the power was conferred, but was so at the time of her death, the residuary clause in her will became, by virtue of the 24th and 27th sections of the Act, a due execution of the power.

It thus appears, upon a consideration of the cases, that not one of them (with the exception of *Morwan* v. *Thompson* (1), upon which, I think, no reliance can be placed) affords the least support to the argument that Mrs. *Dawes*' will was effectual to pass the property acquired by her under the will of her husband.

I will only observe, in conclusion, that the two cases cited for the Respondents, *Price* v. *Parker* (2) and *Trimmell* v. *Fell* (3), are decisions directly opposed to the case of the Appellant.

I am of opinion that the decree appealed from should be affirmed.

LORD HATHERLEY:—

My Lords, I entirely agree in the conclusion at which your Lordships have arrived, and for the same reasons. The reasons which have been assigned by my noble and learned friends who have preceded me have been so full and complete that I have really nothing whatever to add in justification of the conclusion which must necessarily be arrived at in this case. I will therefore put very shortly indeed the mode in which the case strikes me.

There are three subject-matters in this lady's will, I may say four including real estate, or three including only personal estate. There is first a sum of £3000 or thereabouts, which she had for her separate use; as to that there is no dispute. There is next a a sum of £14,000, which was settled, and settled in such a way that by her husband's predeceasing her it became her absolute property, whereas it would have been property subject to the power if she had predeceased her husband, and there is also a large sum of money, said to have amounted to about £70,000, which she acquired from her husband's estate, upon surviving him, under the operation of his will.

(1) 3 Hag. Ec. Rep. 239. (2) 15 Sim. 198.
(3) 16 Beav. 537.

Those being the three matters as to which the contest arises, your Lordships have to see whether under the *Wills Act* Mrs. *Dawes* had capacity to dispose of them or any of them. The *Wills Act* says that she shall have no more capacity for disposing of her property after the *Wills Act* than she had before. Before the *Wills Act* she could have disposed of the £3000 which is not now in dispute, and which she has disposed of by her will. Before the *Wills Act* she had no power of disposing either of any property of her own during the coverture, or of any property which might come to her in any other way after the termination of the coverture. In this particular case the settled money became hers immediately on the termination of the coverture. The husband's property was acquired upon his death. Then had she capacity before the *Wills Act* for disposing either of that £14,000 or of the property that came to her by her husband's decease? Clearly not. As to the money which was subject to her appointment, it was only subject to her appointment in an event which did not occur. In the event which did occur it became her absolute property; you have the authority of the case of *Price* v. *Parker* (1) for saying that that was her property, and before then she was not capable of disposing of it by will. As to the other portion of the property, namely, that which came to her from her husband, she had clearly no power of disposing of it by will.

Certainly I never heard a case better argued than this has been at your Lordships' bar, but although the argument was very ingenious, it is impossible, as it appears to me, to hold that the incapacity of a married woman as to making a will depends solely upon her not having anything to give. The capacity of a married woman as to making a will is just the same as her capacity for contracting, with this exception, she cannot contract of course with the consent of her husband, because the incapacity to contract is a defence against her husband in some respects, but as regards the making of a will the husband, and the husband alone, he being the only person who is interested in her personalty, can assent to her disposition of her property; but otherwise she can do nothing. That being so, my Lords, I am of the same opinion as

(1) 13 Sim. 198.

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that at which your Lordships have arrived in the first place. As to whether the husband's assent would be of any value in the event of his predeceasing I do not think it necessary to express an opinion, although I think I have formed one, but it appears to me that in this case no such assent was, in fact, given as would be necessary to justify your Lordships in holding, for the reasons that have already been assigned, that it is an assent that should pass this property.

That being so, your Lordships have nothing except the £3000 with respect to which, before the passing of the *Wills Act*, Mrs. *Dawes* was capable of making a will. I still hold the view which I expressed in the case of *Thomas* v. *Jones* (1), and I hold it the more confidently since it has been affirmed by Lord *Westbury*, namely, that the *Wills Act* does not capacitate a married woman in any way whatever to make a will which she could not have made before. When she was capacitated with regard to the subject matter of the will, if she, having that capacity, makes a will, your construction must be in accordance with the rule contained in the *Wills Act*, but you are not entitled to look and see whether there is any section in the Act giving her capacity to will, because you are told at the beginning of the Act that it is not intended to give her any such capacity at all, or to affect or alter that capacity. In the case of *Thomas* v. *Jones* (1) the question was not as to the capacity of a married woman, but the question arose on a very nice and curious point, namely, whether or not a power could be exercised before the question of the survivorship had been determined. Whether that case was rightly or wrongly decided, at all events the decision turns upon that point and that point alone, namely, that she was in exactly the same position as to capacity after the passing of the *Wills Act* as before it. The question was exactly the same in that case as in this case; the circumstance of her being under coverture in that case made no difference whatever in the transaction. Then when you had got a valid instrument you would have to construe it. It was ingeniously turned by Mr. *Kay* in his argument in this way: You have got here £3000 validly devised. You have therefore got a

(1) 2 J. & H. 468; 1 De G. J. & S. 63.

valid will, and having got a valid will you must proceed to see how it disposes of the property. If you look at sect. 24 of the *Wills Act* you see that it disposes of all property just as if Mrs. *Dawes* had made her will the day before her death. But that is begging the whole question. The question is, what is the property you are to consider? You have first of all to find out that she had capacity at all to dispose of the property in question. Clearly at the time when she made her will she had no capacity whatever for disposing of that £70,000, nor at any other time was there any capacity to dispose of that particular portion of the property. All that she had power to do was to dispose of the £3000 in the event which has happened, and in an event which did not happen to dispose of the £14,000; but she had no power whatever to dispose of the rest. That being so, you cannot interpret the 24th section of the *Wills Act* as giving her power to do that which she could not otherwise have done.

After the observations which have been made by your Lordships I do not think it necessary to say one word upon the authorities cited at the Bar, they having been amply dealt with by your Lordships. I will only say that I entirely concur in the result, namely, that Mrs. *Dawes*' will can only be effective as to the £3000 of the personalty.

Order appealed from affirmed, and appeal dismissed, with costs.

Lords' Journals, 18th March, 1875.

Solicitors for the Appellant: *Wilde, Berger, Moore, & Wilde.*
Solicitors for the Respondent: *Routh & Stacey.*

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May 4, 7; *June* 7.

MARY WILLIAMS . . . . . APPELLANT;

AND

GEORGE ARKLE . . . . . RESPONDENT.

Will—Residue—Executor, Trustee, or Beneficiary.

The question whether a person is to take as an executor or trustee only, or to have a beneficial interest under a will, is a question of intention, to be ascertained from the words of the will itself.

Where there are trusts to be performed, though they do not exhaust the fund (and then there is a general gift of residue, without any accompanying trust, to the executor), they may be taken to explain special provisions in the will exempting the executor from expense and liability.

A testator had a sister, a wife, and two (illegitimate) children. By his will he appointed *G. A.*, if *G. A.* should survive him, his executor and trustee, but if *G. A.* should die in his lifetime he appointed *B. A.* He then gave "the following legacies": £1000 each to *G. A.* and *B. A.*; £2000 to a great nephew; £100 to his wife, and £100 apiece to his two children. After the gift of other legacies, he gave annuities to his wife and to his two children subject to restrictions as to anticipation, and an annuity to his sister *M. W.* He then gave his freehold and leasehold property (specially described), "and all other my real estate and the residue of my personal estate" (subject to two debts due to his sister) "unto the said *G. A.* for all my estate and interest therein respectively if he shall be alive at my decease, but if he shall die in my lifetime, then I give my said real estate and residuary personal estate unto *B. A.* for all my estate and interest therein respectively." He empowered his trustee to retain or change his investments, to be free from all responsibility on that account, to employ accountants and receivers, to be the guardian of his children during their minority, and he directed that the trustee should possess all powers granted to trustees by the 23 & 24 Vict. c. 145.

Held (*diss.* Lord *Chelmsford*), that the gift of the real and of the residue of the personal estate (the former unaccompanied by any trust) was not affected by the other provisions of the will, and that *G. A.* took them beneficially.

Love v. *Gaze* (1) and *Saltmarsh* v. *Barrett* (2) commented on.

The intention of the statute 11 Geo. 4 & 1 Will. 4, c. 40, explained.

THIS was an appeal against a decision of the Lords Justices, by which a previous decision of Mr. *Little*, Q.C., the Vice-Chancellor of the County Palatine of *Lancaster*, had been affirmed.

James Barton, by a will made on the 28th of March, 1871, said:

(1) 8 Beav. 472. (2) 29 Beav. 474; 3 De G. F. & J. 279.

"I appoint my friend *George Arkle*, of *Liverpool*, banker, if he shall survive me, executor and trustee; but if he shall die in my lifetime, I appoint *Benjamin Arkle*, of *Liverpool*, banker, my executor and trustee. And I give the following legacies and annuities, free from legacy duty, namely, to the said *George Arkle* and *Benjamin Arkle* the sum of £1000 apiece; to my great nephew *Adam Cuppage*, of *Glen Bank, Bally Castle*, county *Antrim, Ireland*, the sum of £2000; to my wife the sum of £100, to be paid her in ten days after my decease; and to my son *James Alfred*, and daughter *Eliza* the sum of £100 apiece; and I direct my executor to pay the same unto them in ten days after my decease, if they shall have attained the age of twenty-one years; but if they shall be under that age, I direct my executor to pay and apply all or any part of the said two sums of £100 for the benefit of my son and daughter as he shall think fit." He then gave different legacies to various people, all individually named, and the will went on thus: "And I give an annuity of £52 to my wife, and the like annuity of £52 apiece to my said son and daughter, and an annuity of £200 to my sister *Mary Williams*, widow, for their respective lives, to be paid quarterly, and the first payment to be made in three months after my death, with a proportionate part thereof to the day of their respective decease." The annuity to his daughter was to be for her separate use; and if his wife married again, or the son or daughter should mortgage his or her annuity, it was, as to any one of them, to cease and fall into the residue. He gave special directions about his being buried in a leaden coffin, and having a monument, to cost not less than £100, erected over his grave; and then the will went on: "And I give, devise and bequeath, and in pursuance of all powers vested in me appoint, all that my freehold house and lands," &c., naming several different properties, freehold and leasehold—"and all other my real estate and the residue of my personal estate, subject however" to a debt to his sister of £3000, "unto the said *George Arkle* for all my estate and interest therein respectively if he shall be alive at my decease; but if he shall die in my lifetime, then I give my said real estate and residuary personal estate unto the said *Benjamin Arkle* for all [my] estate and interest therein respectively. And I empower my trustee to invest my personal estate upon such securities as he

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shall think best, and to continue any investments that may be subsisting at my decease for such period as he shall think prudent, without liability for any loss to be occasioned thereby, and to employ such accountants and receivers as shall be necessary. I appoint my trustee for the time being guardian of my children during their minority, and to my said trustee I devise all estates vested in me upon any trust or by way of mortgage, to the intent that the same may be disposed of as the rules of Law and Equity may require; and I declare that the trustee for the time being of this my will shall have, and may exercise, all or any of the powers and authorities given to trustees in and by ch. 145 of the statutes passed in the 23 & 24 years of her present Majesty."

James Barton died on the 19th of September, 1872, and his will was proved by *George Arkle*, in the district registry of *Liverpool* on the 23rd of October, 1872. He left no legitimate issue, and his sister *Mary Williams* was his sole heiress-at-law and next of kin. He left considerable real and personal estate, which after satisfying all debts and legacies would give a large residue.

On the 10th of December, 1872, *Anne Jane Barton*, the widow, filed her bill in the Court of Chancery of the County Palatine of *Lancaster* against *George Arkle*, praying that it might be declared that the said *George Arkle* was not entitled to any beneficial estate under the said will beyond the legacy of £1000, and that the trusts of the will might be carried out under the direction of the Court. Inquiries were directed, and leave was given to Mrs. *Barton* to amend her bill by adding such parties as she might think fit; and the Registrar having made his report declaring the Appellant *Mary Williams* to be the testator's heiress-at-law and next of kin, her name was added as a Defendant. The cause then came on upon a motion for a decree, and on the 9th of August, 1873, the Vice-Chancellor of the County Palatine made a decree declaring that *George Arkle* was entitled beneficially to the residuary real and personal estate of the testator, and accounts and the necessary directions were given.

Mary Williams appealed against this decree so far as it declared *George Arkle* to be beneficially entitled to the residue, praying that *George Arkle* might, as to the real estate, be declared a trustee for the Appellant as heiress-at-law to *Barton*, subject to the right

of dower (if any) of his widow, and a trustee of the residuary personal estate for the Appellant as *Barton's* next of kin.

On the 25th of March, 1873, the Lords Justices affirmed the decree of the Vice-Chancellor of the County Palatine of *Lancaster*.

This appeal was then brought.

Mr. *Fry*, Q.C., and Mr. *Bardswell*, for the Appellant:—

The supposition that the testator's residuary personal estate was given to the Respondent is contrary to the whole purport of the will, the great object of which is clearly to create a trust, and to appoint a trustee to carry it into effect. No one person alone was appointed trustee. A person (be it recollected, not a relative) was appointed, if he should survive the testator, but if he should not, then another person was to be the trustee. The existence of a trustee was thus secured. That shewed it not an act of personal favour, which might account for a gift of the residue, but only a confidence in the proper discharge of a duty imposed. There was an ample payment provided for the discharge of the duty. That alone furnishes a strong reason for saying that nothing more was intended than to vest the property in the trustee for the purposes of the trust. The same person was appointed guardian of the children, which was also the imposition of a duty on him, and could not have been intended as an act of favour to him at the cost of those children. So, too, as to the duty of the investment of the property and the payment of the legacies. For the due discharge of these duties all the testator's estate was vested in the trustee; but it was so vested for those purposes, and for them alone. And for the same reason, and for no other, was there inserted in the will the general declaration that the trustee should have all the powers given to a trustee under the provisions of the 23 & 24 Vict. c. 145. These various matters (especially the last, which was most important to be considered) shewed most plainly that a mere trust was created—a trust with large powers and varied purposes, but still simply a trust. The principles applicable to a case like the present are in *Ellcock* v. *Mapp* (1) very distinctly expressed. There the estate was given to the executor for the purposes of trusts which were specially described.

(1) 3 H. L. C. 492.

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Those trusts did not exhaust the estate; and the executor claimed the surplus, as the declared purposes of the will had been entirely fulfilled; but this House, adopting the principles laid down by Lord *Eldon* in *Dawson* v. *Clarke* (1), held that the personal estate thus left undisposed of vested in the executor only as a trustee for the widow and next of kin. The statement of Lord *Thurlow* in *Bowker* v. *Hunter* (2) that the declaration that the executor was to take the residue "must prevail unless there was irresistible inference to the contrary" had not been acted on in *Dawson* v. *Clarke* (3); and in *Dean* v. *Dalton* (4) Lord *Thurlow* himself held that the gift of a legacy to the executors and the direction to pay their expenses shewed that the general gift of residue to them was in trust. The general intention of a testator to be gathered from the whole of a will would have governed the case before 1 Will. 4, c. 40, and he would have been held to take the property only as a trustee; but the burden of shewing that intention to be in favour of the executor, and adverse to the next of kin, is now expressly thrown upon him by that statute. He must shew affirmatively that it was so directed by the will. That cannot be done here. There is no such clear direction as to overpower the general legal presumption in favour of the next of kin. In the first place, here is a gift, and a large gift, to the intended trustee. In the earlier cases that itself was treated as shewing that he was paid for his trouble, and that the residue was not intended for him. In the next place, there is the gift of the property to pay debts, legacies, and annuities; and the gift of the real estate and the residue of the personalty is not absolute to *George Arkle*, but appears intended only to enable him to perform the duties imposed on him, so that he does not appear to have a personal interest conferred upon him, one that would pass to his representatives, for it is a gift which is to take effect only on his surviving the testator, and, if he does not survive the testator, the gift is to go over to his brother *Benjamin*. Each of these persons appears, in the first instance, as alternative executor of the testator; and this alternative gift was clearly made to them in the same way, that is, in the character of executor or trustee, and not for any personal benefit. But then,

(1) 18 Ves. 247.
(2) 1 Bro. C. C. 330.
(3) 15 Ves. 417; 18 Ves. 247.
(4) 2 Bro. C. C. 634.

besides, there are the provisions which are intended to secure the executor from personal liability in the discharge of the duties of trustee. The trustee is "empowered" to retain the investments where the testator has made them, or he may change them; and in either case he is not to incur any personal responsibility for loss consequent thereon. So, also, he may appoint accountants and receivers without incurring personal liability. These protections to the trustee, especially as to the change of investments and the appointment of receivers, might perhaps (only perhaps, for he was under no obligation to change the investments, and he could not be answerable for any already made by the testator) be necessary for a trustee, but they were utterly needless for a person who was himself to possess the property. And he was to be paid the expenses incurred in these matters. Surely the testator could not have contemplated that there must be a provision for paying the person he named as trustee out of that person's own funds, the expenses which he might incur of his own will, on his own account, for his own benefit, and with regard to his own property. Such a fancy was too absurd to be entertained, but the protection was well provided for a trustee who was to possess the property as a trustee, to administer it as a trustee, and who might be called on to account for its administration as a trustee, and to account for the expenses he had incurred in its administration. And if this was meant to be an actual gift, and not a mere gift for the purposes of a trust, where was the necessity to insert the direction that the trustee should have all the powers and protection conferred by a recent statute upon a trustee—powers and protection needed by a trustee, but quite needless and indeed ridiculous to be applied to a beneficiary.

Powell on Devises (1), and the cases of *Briggs* v. *Penny* (2), *Foster* v. *Munt* (3), *Farrington* v. *Knightley* (4), *Hames* v. *Hames* (5), *Cole* v. *Jealous* (6), *Francis* v. *Grover* (7), *Barrs* v. *Fewkes* (8), *Love* v. *Gaze* (9), (which was much relied on), and *Meryon* v. *Collett* (10), were cited and commented on.

(1) Vol. i., p. 663.
(2) 3 Macn. & Gord. 546; 21 L. J. (Ch.) 265.
(3) 1 Vern. 473.
(4) 1 P. Wms. 544.
(5) 2 Keen, 646.
(6) 5 Hare, 51.
(7) Ibid. 39; 15 L. J. (Ch.) 99.
(8) 2 H. & M. 60; 33 L. J. (Ch.) 484.
(9) 8 Beav. 472.
(10) 8 Beav. 386; 14 L. J. (Ch.) 369.

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Saltmarsh v. *Barrett* (1) is a very important case. There legacies were given to the executors, and the residue was bequeathed to them "absolutely." They were also authorized to deduct their costs, charges, and expenses out of the estate; and the Master of the Rolls held that they were trustees of the residue for the next of kin. The case was taken before the Lords Justices on appeal, and the decision below was affirmed, though Lord Justice *Knight Bruce* had some hesitation about it. But it was never carried any farther, and therefore may be considered as a settled authority.

And in *Bird* v. *Harris* (2), where the gift was of all the testator's property real and personal to the two persons appointed executors "in and for the consideration of paying over" the rents and profits to the testator's wife for life, it was held that, subject to the life interest, the estate was undisposed of. The reasons for the gift ceased, and the gift ceases with them.

Mr. *Jackson*, Q.C., and Mr. *Ford North*, for the Respondents:—

It may be admitted that in the first instance the duty of paying the annuities and the legacies is expressed as the imposition of a trust; but when the trusts have been exhausted, there is a general gift of the real property and the residue of the personal property, without the declaration of any trust at all. There are stated to be charges amounting to £3000 on that property. Those charges are debts, and the gift of a property subject to a charge, that is a debt, is a gift of the property itself, when that debt has been discharged, the charge being something which must be discharged before the property can be enjoyed. That is an absolute gift. The whole purport of the will shews that to be so here. The gifts to the wife, to the sister, and the two children, are all specific legacies of certain sums to be paid within a limited time, and then annuities are settled on the wife and children. Their amount and the restrictions imposed on the enjoyment of them, shew what was the real mind of the testator as to the benefit intended to be conferred on the wife and children. The benefits intended for his sister are clearly defined, and there is nothing to shew that he proposed that she should receive anything beyond the amount of the specific annuity and the payment of the two sums due to her.

(1) 29 Beav. 474; 3 De G. F. & J. 279–286. (2) Law Rep. 9 Eq. 204.

The cases cited have no application to the present. There was not in any one of them a clear gift of the property. Here there is a clear gift of real estate, and the residue of personal estate, and no restrictions of any sort, express or implied, are imposed on that gift.

As to the clauses in the will which were intended for the protection of the trustee, they were necessary and applicable. There were many things in the discharge of the trusts that were created as to which the trustee might require protection, and if the testator tried to give more protection than was actually necessary, that would not affect other and independent parts of the will.

In *Batteley* v. *Windle* (1) it was held that appointing an executor trustee shall not take from him the residue. That shewed the principle under the old law. The statute 1 Will. 4, c. 40, was not intended to create a different rule, but to render it necessary where the words of the will were capable of admitting of two constructions, that the intention should be made plain as to one or the other—the residue was not to go to the executor as a matter of course, nor was he to be deprived of it as a matter of course. The directions of the testator were to be considered, and the intention they indicated was to be adopted. The intention indicated here was plain; for though there were certain trusts created as to some of the property, the plain gift of the real estate and of the residue of the personal estate was not encumbered with any trust whatever. *In re Henshaw* (2), a decision of Vice-Chancellor *Kindersley*, is the most recent instance, and has never been made the subject of appeal. There the testator gave several legacies of considerable amount to his children to be paid out of his real and personal estate, and he gave £10 each to his executors in case they accepted the office and acted. He then made various specific bequests, "and as to the rest, residue, and remainder of my real and personal estate not hereinbefore otherwise disposed of" he gave it to *A.* and *B.*, and made them the sole executors of his will. By a codicil the testator devised to his executors a particular house not before mentioned, in trust for sale, and the proceeds to be divided among his children. Vice-Chancellor *Kindersley* held that the facts of the executors having equal legacies given them, and taking the residue

(1) 2 Br. C. C. 31. (2) 34 L. J. (Ch.) 98.

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in joint tenancy, though sufficient to have prevented them from taking the residuary personal estate beneficially by virtue of their office, were insufficient to prevent the operation of the clear gift to them as individuals, and that they took the residue under the will beneficially. Here was a distinct gift to *Arkle*, and there was nothing whatever in the will to nullify or affect it.

Mr. *Fry* replied.

THE LORD CHANCELLOR (Lord *Cairns*):—

My Lords, the short question in the present appeal is the meaning of the following sentence in the will of *James Barton*:—[His Lordship read the words of the will, see *ante*, p. 607.]

George Arkle survived the testator; and there is no doubt that the words which I have read would be sufficient and apt words to give *George Arkle* all the freehold and leasehold properties of the testator and the residue of his personal estate, subject to the charges therein mentioned. The Appellant, however, contends that what would and might be the natural meaning of the words is controlled and explained by other provisions in the will, and that *George Arkle* does not take beneficially, but as a trustee; and that as no trusts have been expressly declared, he holds the real estate as a trustee for the heir-at-law, and the residue of the personal estate for the next of kin.

The Vice-Chancellor of the Duchy of *Lancaster* has held that *George Arkle* takes beneficially, and the Lords Justices have been of the same opinion, and against the decision of these three learned Judges the Appellant, the heiress-at-law and sole next of kin of the testator, appeals.

I may begin, my Lords, by putting aside several cases which were cited, and which have little or no bearing on the present appeal. It is an undoubted principle of construction that where you find property given to one individual or more, and a trust is declared of a part, or a trust is declared which does not exhaust the whole of the property, there the creation of the trust is considered to be the sole object of the gift, and that which is unconsumed by the trust results to the representative of the donor. In the present case there are no trusts whatever declared of the real

estate, and, so far as the trusts have to be answered out of the personal estate, these trusts are not founded upon, or to be answered out of, the gift of the residue, but are declared antecedently to the gift of the residue.

Cases of another class were referred to and relied on in the argument, but they appear to me to have little or no bearing upon the present; they were cases arising upon wills to which the statute of 11 Geo. 4 & 1 Will. 4, c. 40, would apply. Before that statute was passed, an executor was entitled, by a presumption and rule of law, to all personal estate which was not actually given to any one else; but Courts of Equity held this rule or presumption to be countervailed and rebutted by various circumstances which it is unnecessary particularly to specify. The statute which I have mentioned recited that testators, by their wills, frequently appointed executors without making any express disposition of the residue of their personal estate, and that executors so appointed became by law entitled to the whole residue of such personal estate, and that Courts of Equity have so far followed the Law as to hold such executors to be entitled to retain such residue for their own use, unless it appears to have been their testator's intention to exclude them from the beneficial interest therein, in which case they are held to be trustees for the person or persons (if any) who would be entitled to such residue under the *Statute of Distributions*, if the testator had died intestate, and that it is desirable that the law should be extended in that respect. The statute then enacts that when any person shall die, having by will appointed any person or persons to be his executor or executors, such executor or executors shall be deemed a trustee or trustees for the next of kin, unless it shall appear by the will that the person or persons so appointed executor or executors, was or were intended to take such residue beneficially.

My Lords, notwithstanding some *dicta* which appear to have fallen from Lord *Langdale* in the case of *Love* v. *Gaze* (1), I cannot entertain any doubt that this statute did not introduce any new rule for the construction of wills. It provides that an executor shall be a trustee for the next of kin unless it shall appear by the will that he is to take the residue beneficially

(1) 8 Beav. 472.

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That is to say, he shall no longer take the residue by implication of law. If the residue is given by the will to the executor, the Court must decide the effect of the gift upon the construction of the will, and upon general principles applicable to that construction, just as before the statute it would have construed a similar gift of real estate. The statute therefore has, of necessity, no application where there is an express gift of residue. In my opinion, the statute was intended to apply only in those cases where the rule or presumption of law could be held to operate, and that, where an express devise of residue is found, the meaning of that residuary bequest must be ascertained by the ordinary rules of construction.

A contrary interpretation of the statute, which would in effect say that the words of a testator shall be construed, not according to their ordinary meaning, but according to an artificial construction, raising a presumption which the law does not raise, and throwing a burden of proof where the law does not throw it, and thus giving by statute to one person what the law on ordinary principles of construction would or might give to another person, would, as it seems to me, be opposed to the preamble and object of the statute. In this particular case the consequence of such an application of the statute would be strange indeed. It could only affect the residue of the personal estate, for the statute refers to personal estate only. The devise of the real estate therefore would have to be construed according to the natural meaning of the words, while the bequest of the residue of the personal estate would, *ex hypothesi*, be construed according to the artificial or parliamentary rule, and thus the identical words might be held to give the residue of the personalty impressed with a trust, and the whole realty without any trust. I observe that Lord *Romilly*, in *Saltmarsh* v. *Barrett* (1), was of opinion that the statute did not apply where there was an express gift; and although Lord Justice *Turner*, when that case was on appeal (2), expressed a doubt on the point, he desired to be understood as giving no distinct opinion upon it. I cannot, for the reasons I have stated, look upon this case as affected by the statute. I put aside, therefore, the cases of executors claiming undisposed-of estate *virtute officii*. My

(1) 29 Beav. 474–477. (2) 3 De G. F. & J. 279.

Lords, these observations would bring this case to be decided upon the construction of this particular will, and not upon any general rule or principle of law.

On the construction of this will the points upon which the Appellant relies are these: *George Arkle*, the Respondent, does not appear to be a relative of the testator. The residue is given, in case *George Arkle* dies in the lifetime of the testator, to *Benjamin Arkle*. The same *George Arkle* is made executor, and the same *Benjamin Arkle* appointed executor in case *George* shall die in the testator's lifetime—*George*, and, in the event of his death, *Benjamin* is appointed not merely executor, but trustee of the will. *George* and *Benjamin* have, each, a legacy of £1000. After the residuary clause there is a power authorizing the testator's trustee to invest his personal estate on such securities as he shall think best, and to continue any investments subsisting at the testator's death, and to employ such accountants and receivers as shall be necessary. The trustee is appointed guardian of the children, and it is declared that the trustee shall have, and may exercise, all or any powers and authorities given to trustees by the Act commonly called *Lord Cranworth's Act*. These are the provisions in the will relied upon by the Appellant.

It is to be observed that none of these provisions refers to or touches the real estate, and, as I have already said, no trust has to be answered out of the devise of the real estate. As regards the personal estate, there are legacies given amounting to about £5000, and annuities which would require the appropriation of something like £10,000 more; and one of these annuities was for the separate use of a married woman. There were, therefore, trusts connected with the personal estate as to which the executors would be trustees, and as to which powers for investment would, and powers for employing clerks and accountants might, be necessary; but all these trusts and purposes connected with the personal estate would have to be satisfied before the residue could be ascertained, and it is the residue and not the *universitas* of the personal estate which is given to *George Arkle*.

But there are several other circumstances connected with the will which in my opinion strongly support the natural construction of the words as a beneficial gift to *George Arkle*. The testator

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had a wife and two illegitimate children, who at the date of the will were of the ages of twenty and sixteen, and for all of them he made specific provision by his will. His sister, the Appellant, was at the date of the will his heiress and sole next of kin, and the person to whom undisposed-of realty, and undisposed-of personalty, other than that which a widow would take, would result. It is true that, at her death, other persons might have become interested; but testators do not generally look beyond the state of their families at the time. It is difficult to reconcile the gifts to the sister and to the wife, both of them apparently intended for maintenance, with a right, reserved to them, to a large undisposed-of residue. Again, if the wife was to marry, or mortgage her annuity, it was to fall into the residue; but of the residue, according to the Appellant's hypothesis, she would take one-half. Again, the real estate is apparently subject to a charge in favour of the testator's sister. But if she were to take the estate as heiress-at-law under a resulting trust, a charge in her favour would be unmeaning. Lastly, there is a devise, to the trustee of the will, of trust and mortgage estates. But this also would be more consistent with a construction which gave the testator's own real estate to *George Arkle* beneficially, than with one which would make the devise of all real estate to be a devise in trust.

My Lords, I have thus gone through the more minute details of this will for the purpose of pointing out that they appear to me to support the case of the Respondent rather than that of the Appellant; and as I think it cannot be shewn that the testator has used the words in the general gift to *George Arkle*, which I commenced by reading, otherwise than in their natural sense, according to which, I repeat, they import a beneficial gift, the case of the Appellant appears to me to fail, and the appeal, as I submit, and move your Lordships, ought to be dismissed, with costs.

LORD CHELMSFORD:—

My Lords, I have the misfortune to stand alone in the conclusion to which I have arrived upon this appeal. In this position I cannot feel much confidence in my own judgment, opposed as it is to the unanimous opinions of all who have before decided, and

who now have to decide, the case. Having, however, formed my opinion, not without frequent and anxious consideration, I feel that I ought not to refrain from expressing it, and that it would not be proper merely to state that I was unable to concur in the affirmance of the decree appealed from, without explaining the reasons which have led me to this difference of opinion.

The question whether a person is to take as executor or trustee only, or the beneficial interest under a will, is a question of intention to be collected from the whole of the will. Before the statute of 1 Will. 4, c. 40, the *onus probandi* was on the party opposing the executor to establish that he was not intended to take beneficially; but since that statute it is otherwise. In *Ellcock* v. *Mapp* (1) it is said, "in the former class of cases there must appear to be an intention to exclude the executor from the beneficial interest, in the latter, to confer that interest upon him."

In the course of the argument it was suggested that the 1 Will. 4, c. 40, did not apply to a case where there was a gift to the executor without a trust being expressly connected with it. I do not consider that this is a correct view of the effect of the Act. In *Love* v. *Gaze* (2) a trustee gave in the most general terms all his personal estate to his executor to "pay as follows." He then gave several legacies, and added, "I wish all to be paid in six months after my death." It was held by Lord *Langdale*, the Master of the Rolls, under 1 Will. 4, c. 40, that the executors did not take the unexhausted residue beneficially, but in trust for the next of kin, on the ground that the statute required that the intention that an executor should take beneficially should appear by the will, and that such an intention did not appear merely by the gift of the residue to the executors.

In *Saltmarsh* v. *Barrett* (3), where there was a bequest of the whole of a testator's estate and effects to three executors by name absolutely, neither the Master of the Rolls nor Lord Justice *Turner* thought that he was precluded by the bequest from considering whether, upon a view of the whole will, it appeared to be intended that the executor should have the estate beneficially. The Master of the Rolls was of opinion (4) "that the statute had

(1) 3 H. L. C. 507.
(2) 8 Beav. 472.
(3) 29 Beav. 474; 3 De G. F. & J. 279.
(4) 29 Beav. 477.

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no application because the residue was expressly disposed of, the only question is whether, upon the whole will, the executors took it as trustees or beneficially." Lord Justice *Turner*, on the contrary (1), looking to the decision in *Love* v. *Gaze* (2), expressed himself as not satisfied that the statute of 1 Will. 4, c. 40, alone did not furnish a sufficient foundation for the decree against the executors.

My noble and learned friend (the Lord Chancellor) agrees with the Master of the Rolls that where there is an express devise of the residue the statute does not apply. But, with great submission, I should have thought that this was just the case to which the statute is applicable. If there is no express devise to an executor there is no room for any question in what character he is to take. But as a devise to him would in itself import that he was to take beneficially, then the meaning of the statute seems clear that it shall not be sufficient for the executor to shew that the will gives him the residue, but he must farther shew that it appears by the will, that is by the whole will, that he was intended to take the residue beneficially.

The question upon the will in the present case, in my opinion, not being concluded by the devise and bequest of the testator's freeholds and leaseholds, and the residue of his personal estate, to *George Arkle*, the executor and trustee, by name, he being bound to shew that it was intended he should take the estates beneficially, I will advert to some of the circumstances which in cases cited in argument have been held to raise a presumption against an executor. At the same time observing that circumstances which before the Act of 1 Will. 4, c. 40, were held to be sufficient to rebut the *primâ facie* title of the executor to the estate for his own benefit, must have additional force since the Act, when he is required to overcome any presumption against him by shewing that there appears upon the face of the will a clear and manifest intention that he should take beneficially. A mere presumption will not be sufficient to establish the right of the executor, the words of the Act being "it shall *appear* by the will," which words cannot be satisfied by saying "it may be *presumed* from the will" that the executor was intended to take for his own benefit.

(1) 3 De G. F. & J. 284. (2) 8 Beav. 472.

7 Jur. N.S. 813

It is said in *Williams'* Executors (1) that it has been long settled that a legacy, however small, to a sole executor will raise the necessary presumption against him. This proposition was supported in the argument by the cases of *Foster* v. *Munt* (2), and *Farington* v. *Knightley* (3). In answer to these cases it was observed that there was in neither of them any gift of the residue. But by law, before the 1 Will. 4, c. 40, all the personal estate of a testator, undisposed of by the will, belonged to the executor beneficially, which at all events placed him in as good a situation as if he had had an absolute gift of the residue. In *Saltmarsh* v. *Barrett* (4), which I have already referred to for another purpose, where there was a bequest of the whole of the estate to the executors by name, the Master of the Rolls first, and afterwards Lord Justice *Turner* upon the appeal, were influenced, in their decisions against the executors, partly by the circumstances of a legacy, though of very small amount, being given to each of them. There were other circumstances in that case adverse to the executors, and it was regarded as one of difficulty, Lord Justice *Knight Bruce* differing, and Lord Justice *Turner*, probably on that account, expressing his opinion doubtfully. Therefore I lay no farther stress upon the case than to observe that circumstances of presumption, and amongst them a gift of legacies to executors, was held sufficient indication that an absolute gift to them was not intended to be for their benefit.

I have mentioned these cases simply because, in considering the will in the present case, I could not help being struck with the large legacy which is given to the executor, which, with other circumstances that I shall presently mention, have led me to the conclusion at which I have arrived.

It would be useless to examine the other cases which were cited on each side, because the question is one of intention, which must be collected from the different circumstances of each particular will. I must notice, however, the case of *Re Henshaw* (5), on which the learned counsel for the Respondents laid some stress. In that case there was a devise and bequest of the residue of real

(1) 6th Ed. vol. i. p. 1368.
(2) 1 Vern. 473.
(3) 1 P. Wms. 544.
(4) 29 Beav. 474; 3 De G. F. & J. 379.
(5) 34 L. J. (Ch.) 98.

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and personal estate to executors by name, and Vice-Chancellor *Kindersley* held that the facts of the executors having equal legacies, and taking the residue in joint tenancy, though sufficient to have prevented them from taking the residuary personal estate by virtue of their office, were insufficient to prevent the operation of the clear gift to them as individuals, and that they took the residue beneficially. The will in that case was made long prior to the 1 Will. 4, when the presumption was in favour of the executor's right to the undisposed-of personal estate for his own benefit, and when the *onus* was upon the person opposing him to exclude him from the beneficial interest, so that the bequest of the residue came in aid of the *primâ facie* right of the executor. But the case shews that, even before the 1 Will. 4, an express and absolute gift to executors might be presumed to have been intended not to be given beneficially, from circumstances of presumption to the contrary contained in other parts of the will.

I will now proceed to point out various circumstances in the present will which, to my mind, raise "a plain implication or strong presumption" (to use the words of the Lord Chancellor in *Ellcock* v. *Mapp* (1)) against the executor.

In looking at the will as a whole, it is impossible not to be struck with what Mr. *Jackson*, the learned counsel for the Respondent, felt himself compelled to admit to be a distinguishing feature of it, that an air of trust pervades it throughout. He also confessed that there were difficulties on his side as well as on that of the Appellant, but he did not appear to remember that the onus of proving the executor to be beneficially entitled was upon him, and that if any cloud of doubt rested upon his case, it was for him to disperse it before he could make it clearly appear that this was the intention of the testator.

The presumptions against the Respondent are more numerous and stronger, in my judgment, than in any former case in which, in consequence of them, an executor has been unable to establish a clear intention to confer the beneficial interest upon him.

In the first place the Respondent, at the very commencement of the will, is appointed, if he survive the testator, executor, and trustee; but if he die in the testator's lifetime, *Benjamin Arkle* is

(1) 3 H. L. C. 492.

appointed executor and trustee, as if the intention was that these characters should apply respectively throughout the will to the different descriptions of property, personal and real, afterwards named in it. The appointment is immediately followed by the bequest of a very large legacy of £1000 to the Respondent and to *Benjamin Arkle* (whom I may call the contingent executor and trustee), presumably, at least, on account of their having been appointed originally or contingently to carry out the trusts of the will.

The will then proceeds to declare in the first part of it the duties which are to be performed by the executor as executor. Then follows the devise and bequest of the freehold and leasehold and the residue of the personal estate to *George Arkle* for all the testator's estate and interest therein respectively, if he shall be alive at the testator's decease, but if he shall die in his lifetime, to *Benjamin Arkle* in like terms. It is observable that this devise and bequest to the *Arkles* are in similar terms of contingent succession with the clause appointing the executor and trustee of the will, apparently giving the estates to them so that one or other of them, as executor and trustee, should have the power of performing any trusts imposed upon him. It appears to me very significant that the former part of the will having dealt with the duties which belong to an executor, after this devise and bequest the remainder of the will is confined to what is to be performed in the character of trustee. Thus, upon the bequest of the residue of the personal estate there immediately follow the words: "I empower my trustee to invest my personal estate" (evidencing that it was given to him as trustee) "upon such securities as he shall think best, without liability for any loss to be occasioned thereby." If the personal estate had been meant to be given to the Respondent for his own benefit, what necessity was there to confer this power, as he might do what he liked with his own, and why provide for his exemption from liability for a loss which must necessarily fall exclusively upon himself?

If it be admitted that the Respondent is a trustee, but of the personal estate only, it may fairly be asked of him (who is bound to prove that it appears by the will that he was intended to have the beneficial interest), how that intention can be shewn by the rest

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of the estates being given by the same clause and in the very same terms as the trust estate is given? One would rather say that the association indicates very strongly an intention that all the estates should be taken in the same character.

Again, the will empowers the trustee to employ such accountants and receivers as shall be necessary. Not an improper provision if the Respondent were really a trustee—an idle and ridiculous one if he were intended to have the beneficial interest in the property.

It would appear, from the witnesses to the will being a solicitor and his clerk, that it was probably prepared by a professional person, who must have considered that the Respondent was a trustee, because he introduced a clause declaring that the trustee for the time being of the will should have and exercise all or any of the powers and authorities given to trustees in and by 23 & 24 Vict. c. 145. The statute would have applied without this declaration, as the powers are applicable unless they are negatived by an express declaration. But the clause is not the less a proof that a trusteeship was intended to be created. Against all these accumulated presumptions, what is opposed as evidence of intention? Nothing whatever, except the fact of the estates being given to the Respondent by name, and no trust being expressly imposed upon the gift. In other words, that a gift to an executor by name, without more, is a sufficient proof that it appears to be intended by the will that he should take beneficially. But no case can be cited, whether before or since the Statute of Will. 4, which has determined that an executor must be intended to have a beneficial interest merely by a gift to him absolutely and by name. In all the cases the question is considered to be one to be collected from the whole will, whether the gift to the executor, however absolute in its terms, was meant to confer the estate upon him beneficially.

In the present case, all the circumstances of presumption adverse to that conclusion appear to me to be so strong that I am totally unable to understand how it can be said that the Respondent has satisfied the obligation cast upon him by the statute to shew that it appears by the will (which must mean not presumptively, but clearly and manifestly) that he was intended to take beneficially. Every part of the will, except the devise and bequest, upon which the question turns, seems to me to indicate a contrary intention.

Not that it is necessary to go the length of proving the negative in opposition to the claim of the executor; it is sufficient to rebut it by relying upon his failure to prove, as he was bound to do, an intention not resting upon presumption, but clearly and distinctly manifested, that he was to have the estates beneficially.

For these reasons, which I have felt bound to state, and which I have expressed, perhaps, with too much confidence, I find it impossible to concur in the affirmance of the decree.

LORD HATHERLEY:—

My Lords, I am obliged to differ from the opinion expressed by my noble and learned friend who has last addressed your Lordships. And being aware that the difference of opinion existed which has now been expressed, I have thought it necessary to go a little more fully than I otherwise should have done into the facts of this case.

The testator made his will on the 28th of March, 1871. He was then a man of the age of seventy-four. He had at the time of making his will a wife, and he had two children, neither of whom was born in wedlock, and the younger of whom appears at that time to have been about thirteen years of age. His sister, *Mary Williams*, was at that time his presumptive heir-at-law and sole next of kin. Now, on looking at the will, we find that he begins by appointing his "friend" (for so he terms him), "*George Arkle* of *Liverpool*, banker, if he shall survive me, executor and trustee; but if he shall die in my lifetime, I appoint *Benjamin Arkle* of *Liverpool*, banker, my executor and trustee." The testator then proceeds to deal with his property, and he gives these two legacies free from legacy duty; first he gives to *George Arkle* and *Benjamin Arkle*, describing them not as executors but by name only, £1000 each. The bequest here is clearly beneficial and not intended to depend upon whether the executorship falls to the one or to the other. He gives to them £1000 a piece without any limitation as to the contingency of the one surviving the other, and therefore those legacies would be effective legacies to each of them, whatever might be the result as to the one surviving the other, unless of course one of the legacies lapsed by one of the two *Arkles* dying in the lifetime of the testator.

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The testator then gives to his great nephew, *Adam Cuppage*, £2000, to his wife £100, to be paid in ten days after his decease; to his son *James Alfred* (one of the illegitimate children), and to his daughter *Eliza* (the other illegitimate child), £100 a piece, and he directs his executor to pay that sum to them in ten days after his decease if they shall have attained the age of twenty-one; but if not, then to apply all or any part of those two sums for the benefit of his son and daughter in such manner as his executor shall think fit. He then gives several legacies to be paid within six months after his decease; and he gives an annuity of £52, that is just £1 a week, to his wife, and a like annuity to his son and daughter a-piece; and he gives an annuity of £200 to his sister, *Mary Williams*. All these annuities are to be paid for their respective lives, and to be paid quarterly, and that given to his daughter is to be for her separate use. He then proceeds with a proviso that if his wife shall marry again, or if she or his son or his daughter shall mortgage or assign their said annuities, or any part thereof, or do any act by which except for this clause those annuities would be payable to any other person, they shall cease and fall into his residuary estate. It is remarkable that he makes no such provision as to the larger annuity of £200 a year that is given to his sister, his heir-at-law and next of kin. Then he directs his executor to purchase a grave and to erect a monument to him. Then he proceeds to give, and in pursuance of all powers vested in him to appoint, certain specified freehold and leasehold property, and all other his real estate and the residue of his personal estate (subject to two debts to his sister) to the said *George Arkle* for all his (the testator's) estate and interest therein respectively if he should be alive at the testator's decease; and if he should die in the testator's lifetime, then he gives his said real estate and residuary personal estate to the said *Benjamin Arkle* "for all estate and interest therein respectively." As has been observed in the Court below the word "my" appears to have been omitted there. It is of no importance.

Now, stopping at this point, the will seems to be in every respect but one, which I shall presently refer to, of the most ordinary form which a testator can adopt when he intends that the person appointed as his executor and trustee shall take the residue

for his own benefit after payment of the debts and legacies. Because, be it observed, the personal estate as a whole passes to the executor for the payment of debts and legacies, and then you find the testator giving to this person upon whom he has imposed the duty of executing his will, the whole of his real estate without any trust whatsoever, but giving him only the residue of the personal estate after the payment of debts and legacies. Now the peculiarity in which this will differs from any ordinary will is this, that the devise of the real estate, and the gift of the residue of the personal estate, are to *George Arkle* first, and to his brother *Benjamin* in the event of *George* predeceasing the testator. There would have been nothing remarkable in this if it had not been that the limitation is in the same form as the executorship. The executorship likewise was to devolve upon his friend *George* in the first instance if he should be alive at the testator's death, and if he should not be alive the executorship was to devolve upon *Benjamin Arkle*. But does this substitution make any difference? If the gift would be valid and effectual supposing there had been only one person named as executor and one person named as trustee, it appears to me that the circumstance that the gift is in the same form as that in which the testator has appointed the executorship and the trusteeship only reduces it to this simple question, Is he or is he not, intending by what he has done to give his property, both the realty and the residuary personal estate, after payment of debts and legacies, beneficially to the same person whom he has appointed as his executor and trustee? Now when a testator has provided, as the testator has done, most remarkably in this will, for his wife, for his sister (his presumptive heir-at-law), for his illegitimate children, and for his great nephew in *Ireland*, to whom he has given a considerable legacy, namely £2000; when he has provided for all of them, what is there to make it improbable, or anything out of the ordinary course of a testator's will, that this bequest, which undoubtedly was an absolute devise for these persons successively, not *quâ* executors or trustees but *nominatim*, should be with the intention of leaving (as he does) the whole of his real estate beneficially, and the residue of his personal estate beneficially, to them after the payment of his debts and legacies?

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My Lords, I have only hitherto proceeded through that part of the will by which the testator disposes of his property. But doubts have been raised in consequence of the provisions which follow in a subsequent part of the will. In a subsequent part of the will there are clauses upon which great reliance has been placed by the counsel for the Appellant, directing that his trustee shall be empowered to invest upon such securities as he shall think best, and also to continue the testator's own investments for such period as he shall think prudent, without liability for loss, and also to employ such accountants and receivers as shall be necessary. He appoints the trustee for the time being guardian of his children during minority, and he gives all his trust and mortgage estates to his trustee, to be disposed of as the rules of Law and Equity may require; and declares that his trustee for the time being shall have all or any of the powers given to trustees under the Act which is commonly called *Lord Cranworth's Act*, 23 & 24 Vict. c. 145.

It may be observed upon those provisions, that all of them are equally applicable to the will on either hypothesis. The payment of the annuities would require nearly £10,000 of personal estate to be invested by the trustee; and the power of investing upon such securities as the executor might think best may very well be read as applicable to that investment which would be necessary for the payment of the annuities. The power to continue investments that the testator had himself made might also well be used for the same purpose as an actual investment by the executor, namely, for the purpose of appropriating a sufficient portion of the testator's personal estate to the payment of the annuities given by his will. Then, again, accountants and receivers might well be employed. Accountants would be wanted for settling all the accounts of the testator's estate; and I may observe that he seems to have had other investments, at least it appears so by his saying that the trustee is to have the *power* of continuing the testator's investments if he thinks fit. In addition to the accountants who would be required for those purposes, a receiver might be employed usefully for receiving the income of the personal estate, or receiving the interest on any mortgages to which the testator might be entitled, and the interest of which would have to be

received either by the trustee himself or by a receiver to be employed at the expense of the estate. So, again, as regards the indemnity from any loss. In this case the instrument which would be necessary to provide for the payment of the annuities would amount, as I have said, to nearly £10,000, supposing it to produce interest at 5 per cent. In the event of a loss occurring upon those investments without any impropriety on the part of the trustee, the provision for indemnity against personal loss in that respect would seem to have its proper meaning and proper effect. It was possible that the state of the testator's assets at his death might be such that the £10,000 which would have to be invested would not be forthcoming, and that a deficiency might accrue during the currency of the annuities. A special clause of indemnity was therefore necessary to protect the trustee from personal liability for the payment of annuities which the investment should be insufficient to meet. In the same way *Lord Cranworth's Act* appears also to be one that is perfectly capable of being adopted and used for this trust, which undoubtedly had to be carried into effect during the period of the currency of the annuities.

Then, my Lords, the statute of 1 Will. 4, c. 40, has been referred to; and my noble and learned friend who spoke last has considered that that statute has an effect upon the decision of the present case, and throws upon the executor or executors, whoever he or they may be (there can never be more than one executor, however, under this will), the burden of shewing that, while taking the legacy, he is intended to take the gift of the residue for his own benefit. Now I confess I entirely agree with the opinion which has been already expressed by the Lord Chancellor, that that statute is really wholly inapplicable to the present case. What is the evil to be remedied by that statute? The preamble states it correctly thus: Testators have frequently appointed executors without making any express disposition of the residue of their personal estate, and the executors so appointed have become entitled to the whole residue. Testators were not aware of the rule of law which said, when once you have appointed an executor you pass *ipso facto* the whole of your personal estate to that executor, and you make him the owner of it for all purposes,

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unless there is some clear indication upon the face of the will that he is only intended to be a trustee. Before this statute, the burden was cast, upon those who wished to make him a trustee, of shewing that he was so from clear indications on the face of the will; and all such indications were laid hold of, especially the word "trustee" used with reference to the appointment of an executor, and with reference to the disposition of the property, that he took by virtue of that appointment. But the Legislature felt that testators were frequently not aware of the consequences of their own act; and that, therefore, if they intended that the executor should take beneficially, it would be right to invert the onus of proof and to throw upon the executor, when so appointed, the necessity of shewing that the testator intended something more than a trust, and indeed something to the contrary. Accordingly the Legislature said: Your merely being appointed executor shall not carry any portion of the personal estate whatever for your own benefit, unless you shew clearly an indication to that effect on the face of the will. It was not intended to lay down any new rule of construction with regard to the words used by testators, but simply to say that the word "executor" alone should not have the effect it up to that time had, and that you must have some other words besides in order to shew that an executor is entitled to take in some other capacity, that is to say, beneficially.

In this case Mr. *Arkle* not being merely appointed executor, but having all the residuary personal estate given to him by name without reference to his office, it appears to me that the burden remains where it was before the passing of that Act. It remains upon those who wish to shew that a clear absolute gift of property was not intended to be a gift to him beneficially, but that some trust is to be imported into the will where no such trust is expressed. In this will the testator devises the whole of his personalty to *George Arkle*. As I said before, Mr. *Arkle* takes the whole personal estate for any purposes that the will may require, and then he takes the residue after those purposes are satisfied, without any intimation whatever being expressed that it is given to him in any other way than in his own personal absolute position as *George Arkle*.

Now, the gift of real estate seems to make this much stronger. My noble and learned friend has observed, in the opinion which he has delivered to your Lordships as representing his view upon the subject, that a portion of the estate being given to *George Arkle* (who is also executor and trustee) with certain trusts attached to it, his inference would be that the trusts must run through the whole of the will. My Lords, I fail to see in this case that any trust whatever is attached to that portion which is given to *George Arkle*. As in the legacy of £1000 he is simply called *George Arkle*, and not executor or trustee, so in the gift of the real estate he is simply called *George Arkle*. The real estate is devised to him, and no trust whatever is imposed upon him as to that; and as to the only remaining portion of the gift, it is not a gift of the whole personalty, but a gift of the residue of the personalty after the trusts of the will have been satisfied. It appears to me, therefore, that no part of the property comes to him as *George Arkle* by virtue of the gift until all the trusts of the will are exhausted, there being no trust at all as to the real estate, and as to the personal estate only the payment of debts, leaving the whole of the remainder to come to him in his personal capacity.

But, my Lords, the difficulty is extreme, as it seems to me, of holding (for it comes back to that point) that the testator, who has so carefully provided in his will for those who would be entitled to his personal estate, namely, his widow and his sole next of kin, a testator who has carefully provided against any imprudence on the part of that widow and his daughter with reference to the annuities which he has given to them, and which are to fall into the residue in case of their attempting to alienate them, should proceed afterwards, having provided an annuity only during that time for his presumptive heir-at-law, his sister *Mary Williams*, who was at that time of the age of sixty-nine, the testator himself being of the age of seventy-four, to give to *George Arkle* the whole of his real estate without saying one word about trust for her or for anybody else, without any apparent object in creating a trust, inasmuch as (as I have said) he has not mistrusted her. Is it likely that, having a perfect confidence in her, he should give the property to *George Arkle* (referring expressly to a debt of £2500 owing to his presumptive heir-at-law, and to another debt

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of £500 to her, which he states to be in his hands) subject to this trust, whereas she being heir-at-law and presumptive heiress of the whole estate, there was no need whatever of mentioning any charge that she had upon it, because she would be mistress of the whole property?

My Lords, taking the view which I do take of these circumstances, and the conclusion I have arrived at in point of law being that the statute of the 1 Will. 4, c. 40, has nothing to do with the case before your Lordships, I cannot but come to the conclusion at which the Lord Chancellor has arrived.

LORD CHELMSFORD:—My Lords, before the question is put I would ask whether in this case the costs ought not to come out of the estate, as there is a difference of opinion among us.

LORD HATHERLEY:—My Lords, I confess that after the sifting that this case has undergone in the Courts below, first before the Vice-Chancellor of the county palatine, and then before the two Lords Justices, with their general concurrence in the view now entertained by your Lordships' House, it would seem to me to be somewhat burdensome to cast upon the residuary legatee the costs of the suit. But at the same time I think there ought to be that good feeling on the part of these gentlemen, the Messrs. *Arkle*, towards their benefactor's family which would induce them to say that they would not ask for costs in such a case.

THE LORD CHANCELLOR:—My Lords, I do not think it would be according to your Lordships' practice, more especially in a case where the two Courts below were unanimous in their opinion, to do otherwise than dismiss an appeal which was unsuccessful here with costs. At the same time I join entirely in what my noble and learned friend has said in expressing a hope that the parties will think it right, more especially considering who they are who are successful in this litigation, to consider whether they should exact the order which, in point of form, would regularly be made upon the dismissal of the appeal.

Mr. *Jackson*:—My Lords, I am without any instructions on this point. Of course what your Lordships have now said shall be

communicated to Mr. *Arkle*. He was willing in the Court below, if no appeal was made to this House, to give up the costs. I have no doubt he is a man who would attend to what your Lordships have said; but in the absence of instructions I should be taking upon myself too much if I were to do other than ask for the order which your Lordships think fit to make upon the appeal.

Decree appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 7th June, 1875.

Solicitors for Appellant: *Field, Roscoe, Field, Francis, & Osbaldeston.*

Solicitors for Respondents: *R. M. & F. Lowe.*

1875
July 11, 14.

JOSEPH TUITE . . . . . APPELLANT;

AND

WILLIAM BERMINGHAM AND OTHERS . . RESPONDENTS.

Will—Eldest Son.

1 App Cas 703.

The only son of a marriage cannot succeed to an estate which had been limited to *A.* and his heirs in tail male, "except an eldest son," and does not come in under a proviso giving the estate to *A.* and "all and every other the son of the body of *A.*, save and except an eldest son."

"Eldest" and "first-born" to be treated as synonymous terms.

H. T., who was possessed of an estate called *S.*, married, in 1792, *Elizabeth C.*, who was possessed of an estate called *B.* They had three children, *H. M. T.*, *G. G. T.*, and *Melesina T.* On the marriage of *H. M. T.* in 1826 the estate of *S.* was settled on *H. T.* and *Elizabeth* (father and mother) for life, with an annuity to *H. M. T.*, and on the death of the father and mother the estate of *S.* was to go to *H. M. T.* for life, and then to his sons in tail male, in default, &c., to *G. G. T.* and his sons in tail male. On the marriage of *G. G. T.* in 1834 the estate of *B.* was settled on *H. T.* (the father) for life, then on *Elizabeth* his wife, then on *G. G. T.* for life, then to his sons in tail male, and in default, &c., to *Melesina* for life, then to the use of *H. M. T.*, then to the use of the second son of *H. M. T.* and his heirs male, and in default, to the use of the third, fourth, fifth, and of "all and every other the son of the body of *H. M. T.*, save and except an eldest son, severally, successively, and in remainder one after another," &c., "the elder of such son and sons, other than an eldest son as aforesaid, to be preferred," &c., "and in default or failure, &c., to the use of *Henry Arabin*, his heirs and assigns for ever." And in case, under the deed of 1826, any person of the issue of *G. G. T.*, other and except a youngest or only son, or the heir male of his body, should become entitled to *S.*, then the use of the estate of *B.* should thereupon cease, and the lands of *B.* should thereupon go over to the person next entitled. *H. M. T.* had one only son. *G. G. T.* had no issue. *Melesina* had been in possession of the estate *B.*, and was dead:—

Held, that on her death the ultimate remainder in the estate of *B.* given to *Henry Arabin* took effect under the words which excluded an eldest son of *H. M. T.* holding *S.*, from succeeding to the possession of *B.*, and that an *only son* of *H. M. T.* had no title to *B.*, and was not to be treated as other than an *eldest son* under the clauses which gave *B.* to the second third, fourth, fifth, and all and every other son of *H. M. T.*, save and except an eldest son.

THIS was an appeal from a decree of the Master of the Rolls in *Ireland.*

In 1792 *Hugh Tuite* married *Sarah Elizabeth Chenevix.* The

settlement before marriage, dated the 7th of November, 1792, recited that Miss *Chenevix* was seised to her and her heirs of certain lands called *Ballycommon* and *Clubbin*, in the *King's County;* and that *Hugh Tuite* was to receive a certain sum of money, beside these lands, as her marriage portion; that the parties were then in *Scotland*, and that the lands were to be held in trust. And *Hugh Tuite* covenanted that he and his intended wife would, after the marriage, settle the said lands, &c., to the use of the said *Sarah Elizabeth* for life for her separate use, then to the use of *Hugh Tuite* for life, and after the death of the survivor to the use of the said *Sarah Elizabeth* and her heirs for ever. And *Hugh Tuite* covenanted that in case he should succeed to any lands, &c., by the death of his elder brother, Sir *Henry Tuite*, without issue, he would secure, out of such lands, to the said *Sarah Elizabeth* such jointure as therein mentioned. He did succeed to a certain manor (of considerable value) called the lands of *Sonna*, in the county of *Westmeath*, and to other lands called *Barne*, in the county of *Longford*. By a deed-poll of the 21st of September, 1805, setting forth these matters, it was recited that there were several children issue of the said marriage, and *Hugh Tuite*, under powers which he possessed, and in accordance with the settlement of 1792, charged the lands with a jointure of £400 a year for his wife, and with £3000 for the portions of younger children. In Michaelmas Term of the same year *Tuite* and his wife levied a fine in the Common Pleas in *Dublin, sur conusance de droit come ceo*, of the lands of *Ballycommon* and *Clubbin*, to enure to such uses as *Hugh Tuite* and his wife should during their joint lives by deed appoint, and in default of such appointment to the use of the said wife and her heirs for ever, and by an indenture of November, 1805, the purposes thus declared were carried into effect. The children of the marriage, at that time, were *Hugh Morgan Tuite* (the Appellant's father), *George Gustavus Tuite*, and *Penelope Melesina Tuite*, since become Mrs. *Lyons*, but now dead.

In February, 1826, *H. Morgan Tuite* married *Mary O'Connor*, and by a settlement then made, to which *Hugh Tuite* (the father) of the first part, *H. Morgan Tuite* of the second part, *Mary O'Connor* of the third part *Gustavus Rochfort* of the fourth part,

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Henry William Arabin of the fifth part, and Sir *John Burke* and *William Arabin* of the sixth part, were parties, reciting the deed of September, 1805, and the other matters, *Hugh Tuite* and *H. Morgan Tuite*, in consideration of the marriage, limited the *Sonna* estate to *Rochfort* and his heirs to the use that *H. Morgan Tuite* should receive, during the joint lives of himself and his father, £600 a year, and subject thereto to the use of *H. Morgan Tuite* for life, and after the decease of *H. Morgan Tuite* (subject and charged as aforesaid) "to the use of the first or only son of the said *H. Morgan Tuite* and *Mary O'Connor*, and the heirs male of the body of such first or only son lawfully issuing, and in default of issue male of a first or only son, to the use of the second and all and every other son of the said *H. Morgan Tuite* and *Mary O'Connor*, severally and successively, and the heirs male of their respective bodies," and in default, &c., to the sons of *H. Morgan Tuite* in like manner, and in default of such issue male, &c., "to the use of the said *George Gustavus Tuite*, second son of the said *Hugh Tuite*, for life, with remainder to the use of the first and every other son of the body of the said *George Gustavus Tuite*, severally and successively, and the heirs male of their respective bodies."

There were two children born of the marriage of *H. Morgan Tuite* and *Mary O'Connor*, the present Appellant and a daughter.

By an indenture of settlement of the 30th of December, 1834, made between *Hugh Tuite* and *Sarah Elizabeth*, his wife, of the first part, *George Gustavus Tuite* of the second part, *H. W. Arabin* of the third part, *H. Morgan Tuite* and Colonel *Thomas Wood* of the fourth part, after reciting the indenture of November, 1805, and the limitation therein of the lands of *Ballycommon* and *Clubbin*, and that a marriage was intended shortly to be had between *George Gustavus Tuite* and *Dorothea Wood*, it was agreed to appoint and assure the said lands of *Ballycommon* and *Clubbin* to *H. W. Arabin* and his heirs to the use of *Hugh Tuite* for life, then to his wife *Sarah Elizabeth* for life, and after her death to the use of *George Gustavus Tuite* for life, &c., and then to the sons of *George Gustavus Tuite* in strict settlement, and in default to *Penelope Melesina Tuite* for life, and after her death, to the use of *H. Morgan Tuite* for life, "remainder to the use of the second son

of *H. Morgan Tuite* and the heirs male of his body," and in like manner to the third, fourth, fifth, and every other son of *H. Morgan Tuite*, save and except an eldest son, severally and successively in remainder, one after another, in seniority of age and priority of birth, and of the heirs male of their respective bodies, the elder of such son and sons, other than an eldest son as aforesaid and the heirs of his body, to be preferred and take before the younger of such sons, and in default or failure of such issue to the use of *Henry Arabin*, his heirs and assigns for ever." And it was provided that in case under the limitations contained in the indenture of February, 1826, being the settlement made on the marriage of *H. Morgan Tuite* and *Mary O'Connor*, any person being issue male of *George Gustavus Tuite*, "other than or except a youngest or an only son, should become entitled in possession to the manor and lands of *Sonna*, the use and estate now (by this indenture) limited to the person so becoming entitled to *Sonna*, and the lands comprised in the indenture of February, 1826, should cease and become void, and the lands by this present indenture limited should go over to the use of the person who, by virtue of the limitations herein contained, would be next entitled in remainder expectant on the failure of issue male of the person so becoming entitled to the *Sonna* estate, as if such person was dead without issue male."

There was no issue male of the marriage of *George Gustavus Tuite* and *Dorothea Wood*.

Mrs. *Sarah Elizabeth* (*Chenevix*) *Tuite* died in the lifetime of her husband. He died in 1843. On the death of *George Gustavus Tuite*, without issue, *Penelope Melesina* (Mrs. *Lyons*) entered into possession of *Ballycommon* and *Clubbin*, as tenant for life under the indenture of December, 1834. She died in 1855, and *H. Morgan Tuite* then entered into possession of these lands as tenant for life under that indenture.

By a lease, bearing date in 1867, he demised these lands to Mr. *Bermingham*. *H. Morgan Tuite* died in August, 1868, and thereupon the Appellant, his only son, claimed possession of the lands. The heirs of *Henry Arabin* claimed in opposition to him, insisting that in the events that had happened the lands of *Ballycommon* and *Clubbin* had passed to the heirs of *Henry Arabin* under the provisions of the deed of 1834. Actions for rent were brought by

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both sets of claimants against Mr. *Bermingham*, who took on himself to defend the action brought by the heirs of *Arabin*. A verdict was given against him, and he then filed a bill of interpleader, and an injunction was granted restraining both sets of Plaintiffs from farther proceedings. The case having thus been brought into the Court of Chancery, it was heard before the Master of the Rolls, who, on the 22nd of November, 1872, made a decree in favour of the heirs of *Henry Arabin* (1). This appeal was then brought.

Mr. *C. Andrews*, Q.C. (of the Irish Bar), and Mr. *Fry*, Q.C., for the Appellant:—

It cannot be supposed that it was the intention of the parties to this settlement to exclude from the enjoyment of one of their estates a descendant of their marriage, a child of their own blood. All that was intended was, that if there was an eldest son who was possessed of the *Sonna* estate, and another son who could receive no benefit from it, both estates should not be combined in the possession of the eldest son, but that the younger son should be provided for by becoming entitled to the *Ballycommon* estate. It was not foreseen that there might be no child of the marriage of *George G. Tuite*, and that there might be but one, an only son of the marriage of *H. Morgan Tuite*, capable of taking the family estates; and therefore there was no intention shewn, that, if such an event should happen, the *Ballycommon* estate was to go over to a stranger. In truth, "eldest," so far from being here synonymous with "only," was really distinguished from and opposed to it, as the phrase "other than an eldest son" plainly indicated.

It was clear, from the language of the deeds as well as from the proper grammatical construction of the particular words here used, that "eldest" son meant, and was restricted to mean, a son who had younger brothers living. He could not be an eldest son if he was an only son, for "eldest" was a word of relation and comparison; nor could he be a "first-born" son if there never was a second; and if there was no other who stood in brotherly relationship to him, or who in comparison with him was younger than he, neither word could be properly applicable. And this gave double force to

(1) Ir. Rep. 7 Eq. 221.

the distinction taken by the use of the words "other than an eldest son," it being the intention of the parties to the settlement that any son other than an *eldest* son, who must be a son with younger brothers, should succeed to the estate.

The principle to be extracted from the cases did not warrant the decision of the Court below. In *Collingwood* v. *Stanhope* (1), Lord *Westbury* described a shifting clause of this sort as one where it was the "great object of parties, in making provision for children, that no one should obtain a double portion at the expense of another." That was a correct description, and it excluded this case from being treated as one where there was a rivalry between two children, for no child would here be doubly benefited at the expense of another, since there was only one who could take, namely, the present Appellant. The principle of construction was therefore in his favour. In *Langston* v. *Langston* (2), an eldest son was allowed to take under words which described, as here, the second, third, fourth, and every "other son" and sons. *Wilbraham* v. *Scarisbrick* (3) established that a word of description, as used here, is to be construed by reference to the intention of the parties; and there can be no doubt here that by the use of the word "eldest" there was no intention to exclude an only son. Such a thought never entered the minds of the parties. In *In re Blake's Estate* (4) there was a marriage settlement by which lands were limited to the first son of *C. B.*, by *J. P.* his intended wife, and the heirs male of the body of such son, with remainder to the second, third, fourth, fifth, and all and every other the sons of *C. B.*, severally and successively, one after another, in seniority of age and priority of birth, in tail male. There was no child by the first wife. On her death *C. B.* married again, and had two sons. There it was held, on appeal, confirming the decision of the Landed Estates Court, that the eldest son of *C. B.* by his second marriage was entitled to the lands as tenant in tail in preference to the second son of such marriage. [LORD O'HAGAN:—In that case there was a specific exception as to the first son by *J. P.*, but there was no ex-

(1) Law Rep. 4 H. L. 43-57.
(2) 2 Cl. & F. 194.
(3) 1 H. L. C. 167.
(4) In the Court of Chancery in Ireland. 19 W. R. 765.

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ception whatever as to the first son of a second wife.] Here there was no son but of the first marriage; but in the word "eldest" there was an exception as to one son of that marriage. The Appellant does not come within that exception, for he is an only son; and the exception was only meant to apply to an eldest son properly so called; that is, to a son who had younger brothers. And in *Driver* v. *Frank* (1) there was a devise to *B. F.* for life, remainder to the second, third, fourth, and all and every other the sons of *B. F.*, except the first or eldest son, successively in tail male, with a remainder over to *F. S.* *B. F.* had no issue at the death of the testatrix. He had afterwards four sons, all of whom, except the fourth, died in his lifetime without issue. It was held that the remainder over was only contingent till *B. F.* had two sons living, and not until his death; and that as soon as he had two sons alive it became vested, and not liable to be divested by any subsequent change in the family of *B. F.*, and therefore that *B. F.*'s fourth son was entitled under the devise. That fourth son, by the events which happened, had become the only son, and therefore, though in common parlance he might have also been called the eldest son, his character as an only son, and not as an eldest son, was recognised, and he succeeded to the estate.

The sentence which gave *Ballycommon* to the use of the second and "every other son of the said *H. Morgan Tuite*" cannot be treated as without any meaning. An eldest son, that is a son with younger brothers, was excluded; but if there was no such person, if the relation of elder and younger did not exist, then any "other son," which would certainly include an only son, might take. This construction of the words was not only warranted in itself, but, on reference to the clause as to the sons of *George Gustavus Taite*, it could hardly be doubted to have been the meaning of the parties. For in that clause, which equally excluded an eldest son, it was provided that a youngest, or "an only son" of *George Gustavus Tuite* might hold *Sonna* without the shifting clause having effect as to *Ballycommon*. So that it was clearly contemplated that a case might arise in which, there being but an only son of the *Tuite* family, he might hold both estates together.

(1) 3 Maul. & Sel. 25; 2 B. Moore, 519; 8 Taunt. 468.

Mr. *Joshua Williams*, Q.C., and Mr. *Howard Elphinstone*, for the Respondents, were not called on.

THE LORD CHANCELLOR (Lord *Cairns*):—

My Lords, after the full opportunity your Lordships have had of considering the very short and narrow question which is presented for our consideration in this appeal, I think your Lordships can have no hesitation as to arriving at the conclusion that the decision of the Court below is completely correct, and ought to be affirmed.

The question lies entirely within the form of one not very lengthy sentence, and upon the construction of that sentence must be solved. The sentence to which I refer is that which limits the devolution and destination of the estate of *Ballycommon* within the family of *Hugh Morgan Tuite*. Your Lordships will bear in mind that Mr. and Mrs. *Tuite*, who are termed the parents, that is to say, *Hugh Tuite* and *Sarah Elizabeth* his wife, had two estates, the one called *Sonna* and the other *Ballycommon*. When I say they had these two estates, I ought, more accurately, to explain that *Hugh Tuite*, the father, had the estate of *Sonna*, the hereditary estate of the *Tuite* family, and that *Sarah Elizabeth*, his wife, either had, or had the means of appointing to, and disposing of, another which belonged to her and her family, the estate of *Ballycommon*. *Hugh Tuite* and *Sarah Elizabeth* his wife had two sons, the elder son, *Hugh Morgan Tuite*, and the second, *George Gustavus Tuite*. *Hugh Morgan Tuite* was married in the year 1826, and upon his marriage the family estate of *Sonna* was settled. The manner in which it was settled was this: it was limited after the interests of the parents to *Hugh Morgan Tuite* for his life, and to his first and other sons in tail.

Then, my Lords, in the year 1834 *George Gustavus Tuite* was married; and it is the settlement upon his marriage which raises the present question. By that settlement the estate of *Ballycommon* was settled, and it was settled again, after interests given to the parents, to *George Gustavus Tuite* for his life, and then to his first and other sons, providing for them; but in the event of his issue failing the second estate, that is what I might term the maternal estate of *Ballycommon*, was limited to go over in a

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certain manner to *Hugh Morgan Tuite* and his issue. It was to go to *Hugh Morgan Tuite* for his life, and in *Hugh Morgan Tuite* both the estates might, and were intended to, coalesce. But after his death the maternal estate of *Ballycommon* was to be separated from the destination of the estate of *Sonna*, so that, if it could be done, a second family might be created to hold the second estate. The way in which it was done was by the sentence which I began by referring to, namely, "from and after the decease of the said *Hugh Morgan Tuite* to the use of the second son of the body of the said *Hugh Morgan Tuite* lawfully begotten, and of the heirs male of the body of such second son lawfully issuing, and for default of such issue male of such second son, to the use of the third, fourth, fifth, and of all and every other the son and sons of the body of the said *Hugh Morgan Tuite* lawfully to be begotten, save and except an eldest son, severally, successively, and in remainder one after another as they and every of them shall be in seniority of age and priority of birth, and of the several and respective heirs male of the body and bodies of all and every such sons and son lawfully issuing, the elder of such son and sons, other than an eldest son as aforesaid, and the heirs male of his body issuing being always to be preferred, and to take before the younger of such son and sons, and the heirs male of his and their body and bodies, and in default or failure of such issue to the use of *Henry Arabin*," "in the county of *Meath*, esquire, his heirs and assigns for ever." What the precise relationship of *Henry Arabin* to the mother was, we are not informed, but we are informed that he stood in some relationship towards her.

Now, my Lords, putting aside for a moment the little clause containing the words "save and except an eldest son," upon which so much argument has turned, your Lordships, I think, will be of opinion that if any person had read this clause without those words he would not have hesitated to say that the intention of those who framed this deed was this: to take the second son of *Hugh Morgan Tuite*, and to commence with him as the head of a series of limitations running on downwards from the second son as the head, that is to say, the second son first, then the third son, then the fourth son, then the fifth son; and then having arrived at the fifth, the author of the deed bearing in mind that there might be six, and

that, if six, there might also be twelve sons, intended in a compendious way to describe all the sons that might come after the fifth by the words "all and every other the son and sons of the body of the said *Hugh Morgan Tuite* lawfully to be begotten." But having used those words "all and every other" he appears to have thought that those words might not of themselves have been sufficient to indicate that from the fifth downwards they were to take in the order in which they came into the world, the sixth, the seventh, and so on; and therefore he appended this general statement, that the elder of such son and sons and the heirs male of his body should always be preferred and take before the younger.

And, my Lords, there is not the slightest doubt that in the early history of conveyancing this was the meaning of a clause of this kind. It was, I repeat, a compendious mode adopted by conveyancers to denote the succession of a number of sons, in place of specifying each by name, indicating, however, that they should all take in the order, as I have said before, in which they came into the world. But, then, it was found out in process of time, and perhaps in consequence of some decisions which took place, that the generality of the words "all and every other sons," where you commenced, as here, in the middle of a family, or not from the eldest son, might, from the effect of the words, result in including some elder son whom you had in the first instance passed over; and therefore in a clause like this, where the eldest son had been passed over, it became necessary to notice that fact in forming the class, or in speaking in general words of the members of a class who were to succeed. It became necessary to put in an exception in order to negative any intention of returning or going back upon a son who had in the first instance been excluded. And there is no doubt that it is for that reason that having mentioned "the third, fourth, fifth, and of all and every other the son and sons of the body of the said *Hugh Morgan Tuite* lawfully to be begotten," the words were added, "save and except an eldest son," indicating that under the general description of "all and every other sons," there was no intention of going back upon that son who had in the first instance been passed over, and giving the estate to him.

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But, my Lords, what was the son who had been passed over? It is quite true that if there were several sons, he would be called, as among those, the eldest; but he was not only the eldest, he was also of necessity the first-born. Now it is by no means an uncommon use of language, even with regard to the term "eldest son," where there is only one, to speak of the first-born as the "eldest," and that for this reason. In speaking of those who may become a class, as to whom there is an expectation that there naturally will be more than one, an expectation always entertained at the time of a marriage settlement like the present, it is not only not an uncommon use, but the natural and ordinary use, of language to speak of the one (of that which is expected to be a class) who first comes into the world as being the first-born or the eldest, even at a time when no others have been added to the class. It is obvious to my mind that it was in this ordinary and natural use of this well-known term that the phrase which I have read was inserted, namely, "save and except an eldest son," that is to say, save and except a first-born son. The meaning of the settlors of the *Ballycommon* estate was: We have no intention of giving this estate of *Ballycommon* to the first-born son, to him who has the hereditary estate of *Sonna*, the paternal estate of the family. We mean to start with the second son, and go down from him to any younger sons there may be of the family.

My Lords, the whole argument of the Appellant seems to me to have rested upon an assumption which I must say we have no right to draw from this deed. The argument starts with the assumption that there never was, and there never could have been, an intention on the part of the settlors of this *Ballycommon* estate to make it pass over to *Henry Arabin* as long as there was any issue of *Hugh Morgan Tuite* alive. My Lords, I find no expression of intention as to that matter in the deed, except in this very clause, which is the clause under construction. It is in this very clause that the expression must be found which indicates it, if it is to be found at all, for it is not to be found certainly in any other part of the deed. I cannot think, however, that the shifting clause has any bearing upon this question. It might very well be that with regard to the maternal estate, the value of

which we do not know, the parents were well content that if *Sonna* came to an only son holding the *Ballycommon* estate, there it should stay, and the two estates should be united in that son holding the *Ballycommon* estate; but that the same parents might well wish, and especially the mother might desire, that as long as the *Sonna* family estates were in existence, and were held by a son or by issue of *Hugh Morgan Tuite*, then if their object of establishing the second family could not be accomplished, that *Ballycommon* estate should go over to *Henry Arabin*, rather than that it should be consolidated with the *Sonna* estate in the issue of *Hugh Morgan Tuite*.

My Lords, we cannot speculate upon whether that would or would not have been the intention of the mother. It may well have been her intention. There is no improbability in it. I cannot at all draw from any part of the deed the conclusion that that may not very well have been her intention. Therefore, we are driven to consider the clause according to the natural meaning of the words without any inference of intention to be raised against that natural meaning from other parts of the deed. My Lords, according to the natural and ordinary meaning of the words, it appears to me that the limitation to a son of *Hugh Morgan Tuite* expressly excludes his first-born son, whether the first-born was the eldest among several brothers, or whether he was the only son of that family.

My Lords, I therefore move your Lordships that this appeal should be dismissed with costs.

LORD CHELMSFORD:—

My Lords, I entirely agree with my noble and learned friend.

In construing the clause of the deed in question we cannot resort to conjecture. If we were at liberty to do so there might perhaps be a difficulty in conjecturing what is likely to have been the intention of the parties to the deed. But the intention is to be collected only from the expression of it in the deed itself; and founding my opinion on the words used, and taking them in their plain and obvious sense, I think that a first-born son, who in the event became an only son, is clearly excluded from taking under the limitations of the lands of *Ballycommon*.

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LORD HATHERLEY:—

My Lords, I am of the same opinion. This case has undoubtedly been very ably argued; but the great difficulty, as it appears to me, in which the Appellants are placed is this: that they cannot find any gift whatever to the eldest son, except in that clause which speaks of "all and every other the son and sons."

There is a distinct gift to the second son of *Hugh Morgan Tuite*, and to the heirs male of that second son lawfully issuing; then, in default of the second son, to the third son; in default of the third son, to the fourth son; and, in default of the fourth son, to the fifth son, "and all and every other the son and sons of the body of the said *Hugh Morgan Tuite*." There, the Appellant says, I bring my case within the principle laid down in *Langston* v. *Langston* (1); the only son of *Hugh Morgan Tuite* is not the "eldest:" plainly, he is not the second, nor the third, nor the fourth, nor the fifth, but he is an "other" son. But then the difficulty is this: you have here that which you had not in *Langston* v. *Langston* (1). In that case you had simply the words "all and every other the son and sons." Here you find also the words, "save and except an eldest son." It appears to me to be clear that the whole line of limitations, commencing with the second son, and going on to the third, fourth, and fifth, and only then bringing in the other sons, and excluding the eldest son, prevents the application of the principle adopted in *Langston* v. *Langston* (1). It precludes you from saying that under the description of "other sons" you can take one son out of the order in which the others have been following, namely, a first-born or an only son, where you have such words as you have in this limitation, namely, "of all and every other the son and sons," followed by "save and except an eldest son."

It is clear to me that there was an intention that one son (the eldest) should be always excepted. It so happens that, as events have occurred, the eldest son is now the only son of the marriage. But in all these settlements the contemplation of the parties in using the expression "eldest son" is that there will be, after the first-born, a succession of sons. That succession is provided for here, and although it may be that in a case where the succession

(1) 2 Cl. & F. 194.

becomes somewhat irregular, you find a possibility of admitting under the term "other sons" one who has not been included in the previous class, yet it seems to me to be impossible to do that where the limitation commences with a clear exclusion of the first-born child. In reading this settlement I think it is clear that you must construe the word "eldest" as meaning "first-born." You find the exception of the eldest son occurring first in the first gift; you find that exception repeated in the gift over after the fourth and fifth sons to other sons. Then finding the exception made in the first instance, and finding it again repeated in the gift over after the fourth and fifth and other sons, you have no possibility of adopting the conclusion which was adopted in the case of *Langston* v. *Langston* (1), which let in the intention of the parties by means of which the Court was enabled in that case fortunately (I say fortunately, because it there happened that the difficulty arose entirely from a mere omission) to let in a son who on the face of the deed seemed to be excluded.

I do not think there is any case here of this being in itself a capricious limitation. There is nothing at all upon the face of the instrument which leads to that conclusion, nor, indeed, have we any right to conjecture from anything existing, *dehors* this clause, in the ordinary arrangements of the family estates that that was the case. Here was the eldest son of *Hugh Morgan Tuite*, and the only son, as it happens, would be the "eldest son" in the sense in which those words are usually intended to be construed in documents of this description. You find that the deeds of settlement convey one estate limited, in the first instance, to the eldest son, and a second estate limited to the second son. You find that in this shifting clause the first-born son of *Hugh Morgan Tuite* must absolutely take the paternal estate; the settlors wished, apparently, that there should be a shifting of these estates; and although in a subsequent proviso they provide that the shifting shall not take place with regard to an only child of the second son, if we may at all conjecture from that circumstance alone, there was not the same reason for a similar provision with regard to one who would have the paternal estates. There may have been reasons which would induce them to say that rather

(1) 2 Cl. & F. 194.

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than that the eldest son of *Hugh Morgan Tuite* should have had in his family both the estates of the husband and the wife, the wife's estate should go back to her family.

Upon the face of this instrument, there appears to me to be nothing which would justify our arriving at a conclusion at all different from that which is expressed in these words. The words themselves seem to me far too clear in their expression to enable us to override them by considerations such as those which were very ably brought forward by the learned counsel. For these reasons, my Lords, I concur in the judgment which has been proposed by the Lord Chancellor.

LORD O'HAGAN:—

My Lords, I should have been content simply to express my concurrence with the noble and learned Lords who have preceded me in holding the decision of the Court below to be very clearly right, notwithstanding the very able and ingenious argument which we have heard, but that I wish to indicate in a few words the grounds on which I think that the judgment in *In re Blake* (1) so much relied on for the Appellant, and to which I was myself a party, is perfectly consistent with this decision and its affirmation by your Lordships. Of course, even if it were otherwise, the House is in no way bound by it; and it is generally vain to apply to the phraseology of one instrument a ruling as to the phraseology of another with which it is not absolutely identical.

The distinction in the case before us seems to me clear alike in the terms and the substance of the provisions dealt with in *In re Blake*, and those to be dealt with here. Here we have the words "save and except an eldest son," which were wanting there, and essentially distinguish the settlements on the very point in controversy; and then the word "other," on which so much stress was laid in argument, became applicable to the eldest son of a second marriage as well as to the other sons, because, although the first son of *Charles Blake* by *Elizabeth Patten* had been mentioned before, the first son by a second wife had not been mentioned at all, and there was no ground in reason or in grammar for excluding

(1) 19 Weekly Rep. 765.

him from the scope of the description "all and every other the son and sons" of *Charles Blake*, without any reference being made to a particular wife. It seems to me that the cases are wholly distinguishable, and that the principle of the ruling in *In re Blake*, when properly understood, would rather necessitate a different ruling on the very different words before us.

On the case generally, I shall only add that "eldest" son, in the exception, appears to me, according to the ordinary meaning of words, to point clearly to a first-born son or a son entitled to the estate of Mr. *Tuite*. And this the more, because I think extreme difficulty would arise if, holding an eldest son to be different from a first-born or only son, we should hold as a consequence that the estate must vest in the first-born at the moment of his birth, to be divested when he should be turned into an "eldest son" on the birth of a second or more properly of a third. And then, on the death of the second or the third, it has not been satisfactorily shewn how the estate could get back to the eldest, whom the terms of the settlement forbids to take it, or in what way he could have it in remainder, as I understood the learned counsel for the Appellant to urge at the Bar.

No such difficulties arise if we give the exception its natural and probable meaning, which does not appear to be brought in question by the argument as to intention, which is not sustained by any clear language in the deed, and as to which we are not, upon any principle of construction, to indulge in speculation. Indeed I do not see ground to conclude that the intention was, as has been suggested, that there should be an end to all the children of the settlor, *Hugh Morgan Tuite*, before *Ballycommon* should go over. The two estates came from the husband and the wife respectively. Of the circumstances and connections, or of the views and purposes of the husband and the wife respectively, we are without any knowledge, save in as far as it is communicated in the deed; and can we conclude with any certainty that it may not have been, for, to her, apparently good reasons, a design in the wife, accepted by the husband, that the possession of *Sonna* by the son of *Hugh Morgan Tuite* should be sufficient for him, and that the *Arabin* family, in certain possible contingencies, should take *Ballycommon*?

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At least, there is nothing on the face of the deed indicating clearly an intention inconsistent with the construction applied to it by the Master of the Rolls; and we cannot imagine or invent provisions to produce an effect which the settlors have deliberately omitted. On the whole, I am clearly of opinion that the appeal should be dismissed with costs.

LORD SELBORNE:—

My Lords, I am of the same opinion.

It is indisputable that, by this deed, every person claiming an estate under the limitations to the use of "all and every other the son of the body of *Hugh Morgan Tuite* lawfully begotten, save and except an eldest son," must take, if he takes at all, by way of contingent remainder after the preceding limitations to the second, third, fourth, and fifth sons of *Hugh Morgan Tuite*, and the heirs of their respective bodies; and, farther, that he must take according to the rule of seniority of age and priority of birth. And I think it would probably be enough to decide this case, that the first-born son of *Hugh Morgan Tuite* could never take by way of remainder after a second, third, fourth, or fifth son (whose existence is contemplated by the deed), either according to the rule of seniority of age and priority of birth, or consistently with the express exclusion of an eldest son.

It is said that the words, "an eldest son," imply the existence of at least one younger son, and that until a second son is born there cannot be an eldest. The argument which we have heard has not persuaded me that in clauses of this kind occurring in family settlements, such words as "save and except an eldest son," ought not (generally and *primâ facie*) to be taken as excluding a first-born son from the moment of his birth, when his succession to certain property by right of primogeniture appears to be the motive for exclusion. There is no more incorrectness of speech in this form of language, so understood, than in the use of the words "first" or "first-born" son, when no second child has been born; and Mr. *Fry*, feeling this, has excepted to that use of language also.

However this may be, I entertain no doubt that, in this particular clause of this particular deed, the words "save and except

an eldest son," do exclude the son who is first-born (whether any other son is afterwards born or not) from the moment of his birth. Nothing is given to an only son as such, nor to any son at all, except the second, third, fourth, and fifth, and other sons (save and except an eldest), by way of remainders after the second, third, fourth, and fifth, and their respective male issue, as already stated. What Mr. *Andrews* and Mr. *Fry* contended for was, that the first-born son would take, necessarily, and immediately on his birth, an estate liable to be divested (once and for ever, as I understood them to admit), on the birth of another son; it being, of course, uncertain, when the first son was born, whether he would eventually be an only son or not, though it was quite certain that, if there were any other, he must be the eldest. This argument seems to me to change the order and the legal effect of the limitations in the deed. It transposes their order, by limiting (in effect) the first estate, after the life interest of *Hugh Morgan Tuite*, to the first-born son; whereas, by the deed, this is limited to the second son; and the first-born (if he were to come in at all) could do so only by force of the words introducing the subsequent remainders after the fifth son and his issue. It also changes their legal effect; because it makes the words, "save and except an eldest son," operate by way of defeasance, to divest an estate, assumed to have vested in the son first-born at the moment of his birth; whereas the real office of those words is to exclude an eldest son, *ab initio*, from being ever reckoned as a member of that class of children to whom alone estates are meant to be limited, and in whom alone estates could vest under the deed.

As for the argument, that some implication in the Appellant's favour may be drawn from the shifting clause applicable to the event of the succession of a son (or male issue of a son), other than an only or youngest son, of *George Gustavus Tuite*, to the *Sonna* estate, it is enough to say that I do not find here any words so ambiguous as to admit of any such aid to their construction. I must, however, add that there is no possibility, even if the Appellant's argument could prevail, of bringing the limitations applicable to the male line of *Hugh Morgan Tuite* into complete harmony with those (including the shifting clause) applicable to the male line of *George Gustavus Tuite*. It may seem to be arbitrary, that the two

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estates should be allowed to be united in the person of an only son of the younger brother, and not in that of an only son of the elder. But it seems to me not less arbitrary to permit the two estates to be united in a second, third, or any other younger son of the elder brother, and not in any younger son of the younger brother, except the youngest; and yet this is altogether inevitable, there being a shifting clause applicable to all the younger sons of *George Gustavus* except the youngest, but none applicable to any younger son whatever of *Hugh Morgan Tuite.*

Decree appealed from affirmed; and appeal dismissed with costs.

Lords' Journals, 14th June, 1875.

Solicitors for the Appellants. *Whyte, Collisson, & Prichard.*
Solicitors for the Respondents: *Clabon & Fearon.*

THE DIRECTORS, &c., OF THE ASHBURY RAILWAY CARRIAGE AND IRON COMPANY (LIMITED) . . . . . } PLAINTIFFS IN ERROR;

AND

HECTOR RICHE . . . . . } DEFENDANT IN ERROR.

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June 1, 4, 7.

Companies Act, 1862—*Memorandum of Association*—*Articles of Association*—*Directors*—*Shareholders*—*Ultra vires*.

A company, created a corporation under the *Companies Act*, 1862 (25 & 26 Vict. c. 89), is not thereby created a corporation with inherent Common Law rights.

The objects of a company proposed to be incorporated under that Act, as stated in the Memorandum of Association required by the 8th section of the Act, cannot be departed from, except so far as the 12th section permits the change. The Memorandum is the Charter of the company.

Consequently a contract made by the directors of such a company upon a matter not included in the Memorandum of Association is *ultra vires* of the directors, and is not binding on the company.

Nor can such a contract be rendered binding on the company though afterwards expressly assented to at a general meeting of shareholders. Being in its inception void, as beyond the provisions of the statute, it cannot be ratified even by the assent of the whole body of shareholders.

A company was registered under the *Joint Stock Companies Act*, 1862. Its objects, as stated in the Memorandum of Association, were these: "to make, and sell, or lend on hire, railway carriages and waggons, and all kinds of railway plant, fittings, machinery, and rolling-stock; to carry on the business of mechanical engineers and *general contractors*; to purchase, lease, work, and sell mines, minerals, land, and buildings; to purchase and sell, as merchants, timber, coal, metals, or other materials, and to buy and sell any such materials on commission or as agents." The directors agreed to purchase a concession for making a railway in a foreign country, and afterwards (on account of difficulties existing by the law of that country), agreed to assign the concession to a *Société Anonyme* formed in that country, which *société* was to supply the materials for the construction of the railway, and receive periodical payments from the English company:—

Held, that this contract, being of a nature not included in the Memorandum of Association, was *ultra vires* not only of the directors but of the company, so that even the subsequent assent of the whole body of shareholders would have no power to ratify it.

Observations upon what must have been done to constitute a ratification of any contract which, though not absolutely void, as unwarranted by the

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Memorandum of Association, had been in excess of the powers possessed by the directors under the articles of association.

The 50th section only authorizes alterations which are within the limits provided by the Memorandum of Association.

MR. *JOHN ASHBURY* had carried on at two places in *Lancashire* a very extensive business in making railway carriages and waggons, turn-tables, points, crossings, and roofs, and other things of a like sort needed by a railway company, but had not been concerned in the construction of railways themselves.

A company called "*The Ashbury Railway Carriage and Iron Company*," incorporated under the *Companies Act*, 1862, was started for the purpose of buying Mr. *John Ashbury's* business, and among the other articles in the agreement for its purchase was this, that the said *John Ashbury* shall not be interested (except as shareholder in a company) in "the business of a railway-carriage maker, iron manufacturer or contractor, or any other business or branch of business theretofore carried on by him at the said works."

A Memorandum of Association of the company, dated on the 12th of September, 1862, was drawn up. By the 3rd clause of this memorandum of association the objects of the company were thus defined: "The objects for which the company is established are to make and sell, or lend on hire, railway-carriages and waggons, and all kinds of railway plant, fittings, machinery, and rolling-stock; to carry on the business of *mechanical engineers and general contractors;* to purchase and sell, as merchants, timber, coal, metals, or other materials; and to buy and sell any such materials on commission, or as agents."

The Articles of Association recited an agreement to purchase the business of *John Ashbury*. The first portion of these articles need not be referred to. In a second portion (which was marked by a different enumeration of clauses), under the heading "Business" the 4th clause was in these terms: "An extension of the company's business beyond or for other than the objects or purposes expressed or implied in the memorandum of association shall take place only in pursuance of a special resolution." By clause 36 of the articles it was provided that "the directors may, with the sanction of a special resolution of the company, previously given in general meeting, increase its capital," &c. By clause 68 the

directors were to have the general conduct of the business of the company, and to "exercise all such powers of the company as are not, by the Act of Parliament or the regulations of the company" to be exercised in general meeting. By clause 70 the directors might "at any board meeting direct the affixing of the seal of the company to any deed or document." By clause 85 the directors might delegate "any of their powers to committees consisting of such member or members of their body as they shall think fit."

In 1864 Mr. *Riche*, the Defendant in Error, was carrying on business in *Belgium*, in partnership with his brother (since deceased) as a railway contractor. On the 14th of March, 1864, the Belgian Government granted to certain persons named *Gillon* and *Bertsoen* a provisional concession for making a line of railway from *Antwerp* to *Tournay*, the payment of two sums of £4000 and £16,000 being settled as what is called "caution money." The two concessionaries desired a company to be formed to carry this concession into effect. It was agreed that Messrs. *Riche* were to have the construction of the line; and in the early part of 1865 the two concessionaries and Messrs. *Riche* and the directors of the *Ashbury Company* met together, and agreed to form a company (*Société Anonyme*) to work the concession. The arrangement was for the *Ashbury Company* to purchase the concession from Messrs. *Gillon* for £70,000, and to give the contract for its construction to Messrs. *Riche*, the company thus becoming, in fact, the contractor for the construction of the line. In this negotiation Mr. *James Ashbury*, one of the directors of the English company, represented that company, and entered into the contracts. Sir *Cusack Roney* afterwards acted in the same character.

The formation of a *société anonyme* in *Belgium*, and the agreement with Messrs. *Riche* that they should construct the line—the *Ashbury* company undertaking to supply the *société anonyme* with the requisite funds—was said to have been adopted because the rails, &c., supplied by a Belgian house would be free from the duty that the Belgian Government imposed on rails imported from *England*, and consequently the profit from the construction of the line would be increased. Messrs. *Riche* began and for some time continued the works for the construction of the line; and for some time, too, the *Ashbury* directors paid, in the name of their com-

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pany, money to the *société anonyme* to which Messrs. *Riche* had become entitled.

Difficulties about payment arose as the work went on, the English shareholders not adopting the views of their directors as to the speculation.

In May, 1867, there was an "extraordinary meeting of the shareholders of the company," at which a report was read from a committee previously appointed at the general meeting of December, 1866. This report disapproved of what had been done by the directors in the matter of the Belgian railway (and likewise of what had been done by them in a similar manner with respect to a Spanish railway), and contained the following declarations: "As regards the two railway concessions, the committee consider the items appertaining to these concessions should not have appeared in the company's books, nor in the balance sheets. But, looking at the important interests involved, and the extent to which they would be jeopardised by proceedings in Chancery, extending over a considerable period, they would recommend the shareholders to endeavour to effect an amicable settlement with the directors, without having recourse to legal proceedings."

The annual meeting was held on the 14th of May, 1867, to consider (among other things) this report. This recommendation in the report of an "amicable settlement with the directors" was considered, and an arrangement was proposed by which the Directors were to "purchase from the *Ashbury Company* any estate or interest which the company may have in the *Antwerp* and *Tournay* railway contract or concession." The *Ashbury Company* was, by the same arrangement, to allow legal proceedings to be taken to enforce the claims or defend any actions, or otherwise, in relation to the said businesses, which might be required, in the name of the *Ashbury Company*, but "at the expense of the said purchasers" (the Directors), who were to indemnify the company against all liabilities.

At a general meeting on the 24th of December, 1867, this arrangement was sanctioned, and though a resolution was proposed "That the accounts be approved and adopted, with the exception that the term 'advances or contracts' be expunged," that was withdrawn and the accounts passed, including that item.

The Company, however, dealing with the brothers *Riche* repu-

diated the contract for constructing the line as one *ultra vires*. Messrs. *Riche* brought an action for damages for breach of contract. The case was referred to a barrister to state a special case, and the question of *ultra vires* was that on which the decision was to depend. The Court was to be at liberty to draw inferences of fact. The question of *ultra vires* was to depend on the following considerations:—

First: The declaration of the objects of the company made in the Memorandum of Association.

Secondly: The words of several of the Articles of Association.

Thirdly: The acts of the Directors, and of meetings of the Company.

The case, setting forth the various matters already stated, was heard, on the 25th of November, 1872, before the Court of Exchequer, consisting of Barons *Martin*, *Bramwell*, and *Channell*, when the Judges differed in opinion, Baron *Bramwell* thinking that the verdict ought to be entered for the Defendants, who represented the shareholders of the company, and the other two learned Barons being in favour of entering the verdict for the Plaintiffs, the Messrs. *Riche*. It was so entered, and the judgment was taken on Error to the Exchequer Chamber, where there was again a difference of opinion; Mr. Justice *Blackburn* delivering a judgment in which Mr. Justice *Brett* and Mr. Justice *Grove* concurred, in favour of affirming the judgment of the Court below, and Mr. Justice *Archibald* delivering an opinion on behalf of Mr. Justice *Keating*, Mr. Justice *Quain*, and himself, for reversing it (1). The Judges being thus equally divided, it stood affirmed, and Error was then brought to this House.

Mr. *Watkin Williams*, Q.C., and Mr. *Cohen*, Q.C., for the Plaintiffs in Error (the shareholders of the company, who were Defendants in the Court below):—

The objects of this company, as stated in the Memorandum of Association, were to supply and sell the materials required to construct railways, but not to undertake their construction. The contract here was to construct a railway, using Messrs. *Riche* only as the persons to be employed in the construction. That was contrary to the memorandum of association; what was done by the directors

(1) The case, in both Courts, is fully reported Law Rep. 9 Ex. 224, 249.

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in entering into that contract was therefore in direct contravention of the provisions of the *Companies Act*, 1862 (1). The 12th section of that statute permits a company, limited by shares, so far to modify the conditions contained in its memorandum of association (subject to certain regulations therein stated) as to increase its capital by the issue of new shares, or so as to divide its shares in a different manner, or to convert its paid-up shares into stock; "but save as aforesaid, and save as is hereinafter provided in the case of a change of name, no alteration shall be made by any company in the conditions contained in its memorandum of association." It was, therefore, not merely in excess of legal powers, but was absolutely illegal for the directors to change those conditions. No consent of the shareholders could make such a contract legal. But in fact no such assent was ever given. The whole body of the shareholders could not give such an assent, and never had intended or attempted to give it.

The very numerous cases arising out of the affairs of the *Agricultural Assurance Company*, such as *Spackman* v. *Evans* (2), *Evans* v. *Smallcombe* (3), and *Houldsworth* v. *Evans* (4), and all of that class, are inapplicable here. In all of them there was no legal objection to the power of the directors; the question was whether they had exercised it properly; whether the conditions on which they had granted compromises were ratified or not, and whether the persons to whom they were granted had fulfilled the conditions. Here the objection was to the power of the directors to do any thing of the kind they had done, namely, to change the object of the company and to make it engage in a business never mentioned in the memorandum of association. It was insisted that they had no such power. It was a farther objection that if they could have done such a thing as that, the shareholders had not in fact ratified it. And, lastly, that even if, as a matter of fact, the shareholders had pretended to ratify it, the legal objection still existed that they had no power to give any such ratification. The contract itself was made without lawful authority; it was therefore void. Being void, it could not be ratified even by the assent of the whole body of shareholders. But finally, the shareholders had

(1) 25 & 26 Vict. c. 89.
(2) Law Rep. 3 H. L. 171.
(3) Law Rep. 3 H. L. 249.
(4) Law Rep. 3 H. L. 263.

never done any thing which was intended to be, or could be construed to be, a ratification.

In the case of the *Attorney-General* v. *Great Northern Railway Company* (1) it was held that a company might be restrained at the instance of a relator from carrying on a trade for which no certificate had been granted. The *Phosphate of Lime Company* v. *Green* (2) had no application to this case, for there it was, at the utmost, only doubtful whether the directors had not the power to act as they did, and that doubt was settled in their favour by the conduct of the shareholders. Here there was no authority whatever for the directors so to act. In all the three cases of *Spackman* v. *Evans* (3), *Evans* v. *Smallcombe* (4), and *Houldsworth* v. *Evans* (5), the same explanation of the decisions may be given. In the *East Anglian Railway Company* v. *Eastern Counties Railway Company* (6), it was distinctly declared that a railway company cannot, even with the assent of all its shareholders, legally enter into contracts involving the application of any portion of its funds to purposes foreign from those for which it was incorporated. The case of *Reg.* v. *Arnaud* (7) is another instance that the legal right must be clear; it was so there, for though it was urged that the corporation consisted of foreigners as well as natives, and that the policy of the navigation laws was not to permit foreigners to be owners of British ships, the answer was that the Court could only recognise the corporation, and not the individual members of it, and that as the application for registration was made by the corporation, and the corporation was a lawfully existing body, the registration must be granted. There the title was plainly apparent, and was not allowed to be contradicted by suggestions into which the Court had no power to inquire. Here the title of the directors depends altogether on the memorandum of association, and that memorandum shewed on the face of it that they had no title to do what they had done. So in *Taylor* v. *Chichester Railway Company* (8), the directors were acting within the scope of their legal authority, and the person with whom they contracted had a good title to contract so far as they were concerned. It is true that all corporate

(1) 6 Jur. 1006.
(2) Law Rep. 7 C. P. 43.
(3) Law Rep. 3 H. L. 171.
(4) Ibid. 249.
(5) Ibid. 263.
(6) 11 C. B. 775; 21 L. J. (C.P.) 23.
(7) 9 Q. B. 806.
(8) Law Rep. 2 Ex. 356; Ibid. 4 H. L. 628.

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bodies are *primâ facie* bound by contracts under their common seal, but they are not so when the legal object of their incorporation prohibits them from making such contracts. In *Soames* v. *Spencer* (1) there was a mere defect in the power to contract; that defect could be removed, and, in fact, was removed by the person who alone could have prevented the contract; he ratified it, and then, of course, the other parties had no power to object. Here it was not a mere defect of power, but the contract itself, not being in accordance with the Memorandum of Association, must be treated as actually prohibited by the words of the statute.

Mr. *Giffard*, Q.C., and Mr. *Benjamin*, Q.C. (Mr. *W. G. Harrison* was with them), for the Plaintiff in the Court below, the now Defendant in Error:—

There had not been here any contravention of the words contained in the memorandum of association, and, consequently, the case is in no way brought within the provisions of the statute. That document not only described the proposed company as a company intended to deal in railway materials and carriages, but also to purchase, lease, and work mines and minerals, and also to carry on the business of mechanical engineers and "general contractors." The description of the objects of the company was, therefore, of the most extensive kind. Surely if the company could purchase, lease, and work mines and minerals, and land, and buildings, it could employ them, or any of them, in any way which promised to be profitable. And then came the words "general contractors," which were large enough to include the making of any contracts—at least, contracts which had some reference to the use of mines, lands, and buildings. So that, upon a fair construction of the memorandum of association, what had been done was really within the objects of the company as there described.

It might be that the construction of a railway was not positively authorized by the very words of the memorandum, but it was not prohibited by them. And if the making of such a contract could be said to be an excess of the powers actually conferred on the directors (which was not admitted), still that contract was capable of ratification by the shareholders if they deemed it to be one which was for the benefit of the company. They had thought so

(1) 1 Dowl. & R. 32.

here, and so far from repudiating it, they had actually adopted it, for they treated themselves as having the power (which they could only have obtained through the act of their directors) to sell the contract; they treated their directors as having the power to become the purchasers from them of that contract, and though they stipulated to be held free from liability on it, they so far acknowledged themselves to be the formal legal holders of it, that they agreed to let the purchasing directors sue on the contract in the name of the company. It would be difficult to say what could be a ratification of any contract if these acts on the part of the shareholders did not constitute a ratification.

A corporation has at common law a right to enter into contracts, and is bound by any contract into which it has entered, as attested by the affixing of its corporate seal. That common law right of a corporation cannot be taken away, except by the express words of a statute, or by the intention of the Legislature so clearly implied as not to be mistaken. Nothing of the sort is so expressed or implied here. And that was the opinion of Mr. Justice *Blackburn*, who, on this point, referred to the cases of the *South Yorkshire Railway Company* v. *Great Northern Railway Company* (1), and *Taylor* v. *Chichester and Midhurst Railway Company* (2), in the latter of which this House had treated as valid an agreement to take land, made by the directors of a railway company before the bill passed which gave them the power to enter into such an agreement.

It could not be said that the *Ashbury* directors had parted with a contract to supply the materials for the railway, and had made themselves merely the contractors to make the railway, leaving the supply of the materials in the hands of another company, the *société anonyme*, for there was in the arrangement with that body (which was really created only for the benefit of the *Ashbury* company) a stipulation that there should always be a certain number of the *Ashbury* directors in the direction of the *société anonyme*. And this had been done, and in fact the Belgian *société* consisted chiefly of the directors of the English company, that it might be under the control of the *Ashbury Company*. It was, therefore,

(1) 9 Ex. 55, *per Parke*, B., 84.
(2) 4 H. & C. 409; Law Rep. 2 Ex. 56; Ibid. 4 H. L. 628.

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quite natural that the shareholders of the English company should consider the contract as their own property, and should deal with it as such, even when they were casting on their directors all the liabilities that might possibly attach to it. But, if so, there was an end of their claim to repudiate it.

But, if there was any objection capable of being raised to the contract itself as being in any way unsuited to the declared objects of the company, it is clear that that contract has been ratified by the acts of the shareholders themselves, and ratified, too, not in hasty mistake, but after deliberate consideration. For, first, there was a discussion upon some items in the company's accounts; then a committee of investigation appointed; then a report of that committee made; then a discussion of that report; and then a resolution of the company that the directors who had made the contract should themselves purchase it from the company, and undertake its execution. There was no distinct repudiation of it; on the contrary, there was a real adoption of it; for, though the company required the directors to undertake it, they were required to do so as purchasers of it from the company; while, at the same time, the shareholders, treating the contract as one which could be enforced, authorized the directors to sue on it in the name of the company, only indemnifying the company against all costs. In this way the shareholders really asserted the contract to be a valid contract, and themselves to be the owners of it; they affected to sell it as a property belonging to themselves, and claimed to have the power of authorizing the name of their company to be used in suits relating to it. Surely these acts constituted a complete ratification of the contract. Or if they did not, as between the directors and the company, they did so as between the company and those with whom the directors had been dealing. It would be so even where a contract had been entered into without the observance of those forms which a public statute required in order to give a contract validity. The case of *Soames* v. *Spencer* (1) abundantly proved that. And *Bargate* v. *Shortridge* (2) clearly established that acts which, as between a shareholder and the directors, might be wholly invalid, so as to subject the directors to liability to him, might be perfectly good as to third persons, so as

(1) 1 Dowl. & R. 32. (2) 5 H. L. C. 297.

to subject the whole company, shareholders included, to liability to such third persons.

This is not a question merely between a shareholder who says that his agents, the directors, have exceeded their powers, and that his fellow-shareholders have never adopted what they have done; it is a question between the directors and shareholders on the one hand, and an innocent third party, a contractor with them, on the other. In such a case the principle must be in favour of the innocent contractor, and the relative powers of the directors and shareholders are matters which cannot affect him. He was not bound to inquire what was the exact extent of the powers of the directors. To all appearance they were in the full enjoyment of the powers they pretended to exercise, and the contract into which they entered was for some time fully performed; and when, afterwards, their prudence in entering into it was questioned, the shareholders did not treat it as null and void, but substantially adopted it.

In all respects, therefore, it was a good contract, and the judgment of the Court below was right.

The cases already cited were commented on; and others, where subsequent confirmation had affirmed contracts, were referred to.

Mr. *Watkin Williams* replied.

THE LORD CHANCELLOR (Lord *Cairns*):—

My Lords, the history and progress of the action out of which the present appeal arises is not, I must say, creditable to our legal proceedings. There was not in the case any fact in dispute; and the only questions which arose were questions of law, or questions, perhaps, as to the proper inference to be drawn from facts as to which there was no dispute. The action, however, was commenced so long ago as the month of May, 1868. The litigation appears to have been active and continuing, and yet seven years have been consumed, and the result of all, up to the present time, is this, that in the Court of Exchequer, two out of the three Judges were of opinion that the Plaintiff should have judgment; and when the case came before the Exchequer Chamber, it was heard before six Judges, three of whom were of opinion that the Plaintiff

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was entitled to judgment, the other three thinking that the Defendant was entitled to judgment. The result, therefore, was that the judgment of the Court of Exchequer was affirmed.

My Lords, but for this difference of opinion among the learned Judges, I should have said that the only questions of law which arise in the case, the questions which appear to me to be sufficient altogether to dispose of the case, were of an extremely simple character. The action was brought by the Plaintiffs, who appear to be contractors in *Belgium*, and it was brought for damages for the breach of an agreement entered into between the Plaintiffs and the shareholders, constituting the *Ashbury Railway Carriage and Iron Company, Limited.*

These persons constituted a company established under the *Joint Stock Companies Act* of 1862. I think your Lordships will find it necessary to consider with some minuteness some of the leading provisions of that Act of Parliament. But, in the first place, you will find it convenient to ascertain the purposes for which this company was formed, and then the nature of the agreement, or contract, for the breach of which the present action was brought.

The purposes for which a company, established under the Act of 1862, is formed, are always to be looked for in the Memorandum of Association of the company. According to that Memorandum, the *Ashbury Railway Carriage and Iron Company, Limited*, is formed for these objects—"to make and sell, or lend on hire, railway carriages and waggons, and all kinds of railway plant, fittings, machinery, and rolling stock; to carry on the business of mechanical engineers and general contractors; to purchase, lease, work, and sell mines, minerals, land, and buildings; to purchase and sell, as merchants, timber, coal, metals, or other materials, and to buy and sell any such materials on commission or as agents." Part of the argument at your Lordships' Bar was as to the meaning of two of the words used in this part of the memorandum—the words "general contractors." My Lords, as it appears to me, upon all ordinary principles of construction those words must be referred to the part of the sentence which immediately precedes them. The sentence which I have read is divided into four classes of works. First, "to make and sell or lend on hire railway car-

riages and waggons and all kinds of railway plant, fittings, machinery, and rolling stock." That is an object *sui generis* and complete in the specification which I have read. The second is "to carry on the business of mechanical engineers and general contractors." That, again, is the specification of an object complete in itself; and, according to the principles of construction, the term "general contractors" would be referred to that which goes immediately before, and would indicate the making generally of contracts connected with the business of mechanical engineers—such contracts as mechanical engineers are in the habit of making, and are in their business required, or find it convenient, to make for the purpose of carrying on their business. The third is, "to purchase, lease, work, and sell, mines, minerals, land, and buildings." That is an object pointing to the working and the acquiring of mineral property, and the generality of the last two words, "land and buildings," is limited by the purpose for which land and buildings are to be acquired, namely, the leasing, working, and selling, mines and minerals. The fourth head is, "to purchase and sell, as merchants, timber, coal, metals, or other materials, and to buy and sell any such materials on commission or as agents." That requires no commentary.

My Lords, if the term "general contractors" were not to be interpreted as I have suggested, the consequence would be that it would stand absolutely without any limit of any kind. It would authorize the making, therefore, of contracts of any and every description, and the memorandum in place of specifying a particular kind of business would virtually point to the carrying on of business of any kind whatever, and would therefore be altogether unmeaning.

My Lords, that being the object for which the company professes by the memorandum of association to be incorporated, I now turn to examine the contract upon which the present action is brought. I may relieve your Lordships from any lengthened exposition of the nature of that contract by referring you to the account given of it by Mr. Baron *Bramwell* in the Court of Exchequer, which appears to me accurately to describe the general nature of the contract. Mr. Baron *Bramwell* states this (1): "The substance

(1) Law Rep. 9 Ex. 234.

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of those contracts"—that is, the contract upon which the action was brought, and two other contracts, which are inseparably connected with it—"The substance of those contracts was this: *Gillon* and *Baertsoen* had obtained the right to make a railway in *Belgium*. This right the Defendants' directors supposed to be valuable to its owners; that is to say, the line could be constructed for a certain sum, and a *société anonyme* could be constituted with shareholders to take its shares to an amount which would give a large sum over the cost of construction. The benefit of this the directors desired to obtain for the Defendant company, and to do so purchased the concession. This was their main object. But the Plaintiffs held a contract with the concessionaries to construct the line, and to accomplish the directors' object it was necessary or desirable, or they thought it was, that they should agree with the Plaintiffs that the Defendants should constitute a *société anonyme*, and, as the Plaintiffs went on with the work, the Defendants should pay into the hands of the *société* proportionate funds. The farther contract entered into in the Defendants' name, called *D.*, is of no importance in this case. The directors accordingly entered into two contracts in the Defendants' name—one with the concessionaries to purchase the concession; the other with the Plaintiffs to furnish the *société anonyme* with funds, the latter contract being auxiliary to the former. They paid the concessionaries £26,000, part of the price. Now, whatever may be the meaning of 'carry on the business of mechanical engineers and general contractors,' to my mind it clearly does not include the making of either of these contracts. It could only be held to do so by holding that the words 'general contractors' authorized generally the making of any contracts; and this they certainly do not."

My Lords, I agree entirely, both with the description given here by Mr. Baron *Bramwell* of the nature of the contract and with the conclusion at which he arrived, that a contract of this kind was not within the words of the memorandum of association. In point of fact it was not a contract in which, as the memorandum of association implies, the limited company were to be the employed, they were the employers. They purchased the concession of a railway—an object not at all within the memorandum of association; and

having purchased that, they employed, or they contracted to pay, as persons employing, the Plaintiffs in the present action, as the persons who were to construct it. That was reversing entirely the whole hypothesis of the memorandum of association, and was the making of a contract not included within, but foreign to, the words of the memorandum of association.

Those being the results of the documents to which I have referred, I will ask your Lordships now to consider the effect of the Act of Parliament—the *Joint Stock Companies Act* of 1862—on this state of things. And here, my Lords, I cannot but regret that by the two Judges in the Court of Exchequer the accurate and precise bearing of that Act of Parliament upon the present case appears to me to have been entirely overlooked or misapprehended; and that in the Court of Exchequer Chamber, speaking of the opinion of those learned Judges who thought that the decision of the Court of Exchequer should be maintained, the weight which was given to the provisions of this Act of Parliament appears to me to have entirely fallen short of that which ought to have been given to it. Your Lordships are well aware that this is the Act which put upon its present permanent footing the regulation of joint stock companies, and more especially of those joint stock companies which were to be authorized to trade with a limit to their liability.

The provisions under which that system of limiting liability was inaugurated, were provisions not merely, perhaps I might say not mainly, for the benefit of the shareholders for the time being in the company, but were enactments intended also to provide for the interests of two other very important bodies; in the first place, those who might become shareholders in succession to the persons who were shareholders for the time being; and secondly, the outside public, and more particularly those who might be creditors of companies of this kind. And I will ask your Lordships to observe, as I refer to some of the clauses, the marked and entire difference there is between the two documents which form the title deeds of companies of this description—I mean the Memorandum of Association on the one hand, and the Articles of Association on the other hand. With regard to the memorandum of association, your Lordships will find, as has often already been

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pointed out, although it appears somewhat to have been overlooked in the present case, that that is, as it were, the charter, and defines the limitation of the powers of a company to be established under the Act. With regard to the articles of association, those articles play a part subsidiary to the memorandum of association. They accept the memorandum of association as the charter of incorporation of the company, and so accepting it, the articles proceed to define the duties, the rights and the powers of the governing body as between themselves and the company at large, and the mode and form in which the business of the company is to be carried on, and the mode and form in which changes in the internal regulations of the company may from time to time be made. With regard, therefore, to the memorandum of association, if you find anything which goes beyond that memorandum, or is not warranted by it, the question will arise whether that which is so done is *ultra vires*, not only of the directors of the company, but of the company itself. With regard to the articles of association, if you find anything which, still keeping within the memorandum of association, is a violation of the articles of association, or in excess of them, the question will arise whether that is anything more than an act *extra vires* the directors, but *intra vires* the company.

The clauses of the statute to which it is necessary to refer are four: in the first place, the sixth clause. That provides that "Any seven or more persons associated for any lawful purpose may, by subscribing their names to a memorandum of association, and otherwise complying with the requisitions of this Act in respect of registration, form an incorporated company, with or without limited liability." My Lords, this is the first section which speaks of the incorporation of the company; but your Lordships will observe that it does not speak of that incorporation as the creation of a corporation with inherent common law rights, such rights as are by common law possessed by every corporation, and without any other limit than would by common law be assigned to them, but it speaks of the company being incorporated with reference to a memorandum of association; and you are referred thereby to the provisions which subsequently are to be found upon the subject of that memorandum of association.

The next clause which is material is the eighth: "Where a company is formed on the principle of having the liability of its members limited to the amount unpaid on their shares, hereinafter referred to as a company limited by shares, the Memorandum of Association shall contain the following things" (I pass over the first and second, and I come to the third item which is to be specified): "The objects for which the proposed company is to be established." That is, therefore, the memorandum which the persons are to sign as a preliminary to the incorporation of the company. They are to state "the objects for which the proposed company is to be established;" and the existence, the coming into existence, of the company is to be an existence and to be a coming into existence for those objects and for those objects alone.

Then, my Lords, the 11th section provides: "The memorandum of association shall bear the same stamp as if it were a deed, and shall be signed by each subscriber in the presence of, and be attested by, one witness at the least, and that attestation shall be a sufficient attestation in *Scotland*, as well as in *England* and *Ireland*. It shall, when registered, bind the company and the members thereof to the same extent as if each member had subscribed his name and affixed his seal thereto, and there were in the memorandum contained, on the part of himself, his heirs, executors, and administrators, a covenant to observe all the conditions of such memorandum, subject to the provisions of this Act." Your Lordships will observe, therefore, that it is to be a covenant in which every member of the company is to covenant that he will observe the conditions of the memorandum, one of which is that the objects for which the company is established are the objects mentioned in the memorandum, and that he not only will observe that, but will observe it subject to the provisions of this Act. Well, but the very next provision of the Act contained in the 12th section is this: "Any company limited by shares may so far modify the conditions contained in its memorandum of association, if authorized to do so by its regulations as originally framed, or as altered by special resolution in manner hereinafter mentioned, as to increase its capital by the issue of new shares of such amount as it thinks expedient, or to consolidate and divide its capital into shares of larger amount than its existing shares, or to convert its

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paid-up shares into stock, but, save as aforesaid, and save as is hereinafter provided in the case of a change of name, no alteration shall be made by any company in the conditions contained in its memorandum of association." The covenant, therefore, is not merely that every member will observe the conditions upon which the company is established, but that no change shall be made in those conditions; and if there is a covenant that no change shall be made in the objects for which the company is established, I apprehend that that includes within it the engagement that no object shall be pursued by the company, or attempted to be attained by the company in practice, except an object which is mentioned in the memorandum of association.

Now, my Lords, if that is so—if that is the condition upon which the corporation is established—if that is the purpose for which the corporation is established—it is a mode of incorporation which contains in it both that which is affirmative and that which is negative. It states affirmatively the ambit and extent of vitality and power which by law are given to the corporation, and it states, if it is necessary so to state, negatively, that nothing shall be done beyond that ambit, and that no attempt shall be made to use the corporate life for any other purpose than that which is so specified.

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Now, my Lords, with regard to the articles of association, observe how completely different the character of the legislation is. The 14th section deals with those articles: "The memorandum of association may, in the case of a company limited by shares, and shall, in the case of a company limited by guarantie, or unlimited, be accompanied, when registered, by articles of association, signed by the subscribers to the memorandum of association, and prescribing such regulations for the company as the subscribers to the memorandum of association deem expedient." They are to be the masters of the regulations which (always keeping within the limit allowed by law) they may deem expedient for the internal regulation of the company. "The articles shall be expressed in separate paragraphs, numbered arithmetically. They may adopt also any of the provisions contained in the table marked A. in the first schedule hereto." I need not read the remainder of that section.

But your Lordships must take, in connection with that, the 50th section of the Act. That provides that "subject to the provisions of this Act, and to the conditions contained in the memorandum of association, any company formed under this Act may, in general meeting, from time to time, by passing a special resolution in manner hereinafter mentioned, alter all or any of the regulations of the company contained in the articles of association, or in the table marked A. in the first schedule, where such table is applicable to the company, or make new regulations to the exclusion of, or in addition to, all or any of the regulations of the company." Of the internal regulations of the company the members of it are absolute masters, and, provided they pursue the course marked out in the Act, that is to say, holding a general meeting and obtaining the consent of the shareholders, they may alter those regulations from time to time; but all must be done in the way of alteration subject to the conditions contained in the memorandum of association. That is to override and overrule any provisions of the articles which may be at variance with it. The memorandum of association is, as it were, the area beyond which the action of the company cannot go; inside that area the shareholders may make such regulations for their own government as they think fit.

My Lords, that reference to the Act will enable me to dispose of a provision in the articles of association in the present case which was hardly dwelt upon in argument, but which I refer to in order that it may not be supposed to have been overlooked. It appears that there has come into the articles of association of this company one which is in these words: "An extension of the company's business beyond or for other than the objects or purposes expressed or implied in the memorandum of association shall take place only in pursuance of a special resolution." In point of fact, no resolution for the extension of the business of the company was in this case come to; but even if it had been come to, it would have been entirely inept and inefficacious. There was, in this 4th article, an attempt to do the very thing which, by the Act of Parliament, was prohibited to be done—to claim and arrogate to the company a power under the guise of

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internal regulation to go beyond the objects or purposes expressed or implied in the memorandum.

Now, my Lords, bearing in mind the difference which I have just taken the liberty of pointing out to your Lordships between the memorandum and the articles, we arrive at once at all which appears to me to be necessary for the purpose of deciding this case. I have used the expressions *extra vires* and *intra vires*. I prefer either expression very much to one which occasionally has been used in the judgments in the present case, and has also been used in other cases, the expression "illegality."

In a case such as that which your Lordships have now to deal with, it is not a question whether the contract sued upon involves that which is *malum prohibitum* or *malum in se*, or is a contract contrary to public policy, and illegal in itself. I assume the contract in itself to be perfectly legal, to have nothing in it obnoxious to the doctrine involved in the expressions which I have used. The question is not as to the legality of the contract; the question is as to the competency and power of the company to make the contract. Now, I am clearly of opinion that this contract was entirely, as I have said, beyond the objects in the memorandum of association. If so, it was thereby placed beyond the powers of the company to make the contract. If so, my Lords, it is not a question whether the contract ever was ratified or was not ratified. If it was a contract void at its beginning, it was void because the company could not make the contract. If every shareholder of the company had been in the room, and every shareholder of the company had said, "That is a contract which we desire to make, which we authorize the directors to make, to which we sanction the placing the seal of the company," the case would not have stood in any different position from that in which it stands now. The shareholders would thereby, by unanimous consent, have been attempting to do the very thing which, by the Act of Parliament, they were prohibited from doing.

But, my Lords, if the shareholders of this company could not *ab ante* have authorized a contract of this kind to be made, how could they subsequently sanction the contract after it had, in point of fact, been made? I endeavoured to follow as accurately as I could the very able argument of Mr. *Benjamin* at your Lord-

ships' Bar on this point; but it appeared to me that this was a difficulty with which he was entirely unable to grapple. He endeavoured to contend that when the shareholders had found that something had been done by the directors which ought not to have been done, they might be authorized to make the best they could of a difficulty into which they had thus been thrown, and therefrom might be deemed to possess power to sanction the contract being proceeded with. My Lords, I am unable to adopt that suggestion. It appears to me that it would be perfectly fatal to the whole scheme of legislation to which I have referred, if you were to hold that, in the first place, directors might do that which even the whole company could not do, and that then, the shareholders finding out what had been done, could sanction, subsequently, what they could not antecedently have authorized.

My Lords, if this be the proper view of the Act of Parliament, it reconciles, as it appears to me, the opinion of all the Judges of the Court of Exchequer Chamber; because I find Mr. Justice *Blackburn*, whose judgment was concurred in by two other Judges who took the same view, expressing himself thus (1): "I do not entertain any doubt that if, on the true construction of a statute creating a corporation it appears to be the intention of the Legislature, expressed or implied, that the corporation shall not enter into a particular contract, every Court, whether of law or equity, is bound to treat a contract entered into contrary to the enactment as illegal, and therefore wholly void, and to hold that a contract wholly void cannot be ratified." My Lords, that sums up and exhausts the whole case. In my opinion, beyond all doubt, on the true construction of the statute of 1862, creating this corporation, it appears that it was the intention of the Legislature, not implied, but actually expressed, that the corporation should not enter, having regard to its memorandum of association, into a contract of this description. If so, according to the words of Mr. Justice *Blackburn*, every Court, whether of law or of equity, is bound to treat that contract, entered into contrary to the enactment, I will not say as illegal, but as *extra vires*, and wholly null and void, and to hold also that a contract wholly void cannot be ratified.

(1) Law Rep. 9 Ex. 262.

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My Lords, that relieves me, and, if your Lordships agree with me, relieves your Lordships from any question with regard to ratification. I am bound to say that if ratification had to be considered I have found in this case no evidence which to my mind is at all sufficient to prove ratification; but I desire to say that I do not wish to found my opinion on any question of ratification. This contract, in my judgment, could not have been ratified by the unanimous assent of the whole corporation.

I have only to add to what I have already said, that I observe that some cases have been referred to here—those arising out the *Agriculturist Cattle Insurance Company* in your Lordships' House (1), and the case of the *Phosphate of Lime Company* v. *Green* in the Court of Common Pleas (2)—as if they had some bearing on the present question. Those cases have a bearing upon some of the observations with which I have troubled your Lordships. They are cases which illustrate extremely well what I have said just now, that the articles of association of a company of this kind are the documents which define the power of directors as between themselves and the company. In those cases which I have mentioned the whole question was, whether the directors had gone beyond the powers which were entrusted to them, and by which their authority was limited under the articles of association, or whether that which had been agreed to had been duly performed. In no one of those cases was there any question as to whether the power of the whole company had been exceeded. In the cases of the *Agriculturist Cattle Insurance Company* (1) no person ever doubted that if the shareholders had assembled together they might have released from the obligation of a partnership contract *inter se* (for there was no question of outside creditors) any member of the company upon any terms that they thought fit. The only question was whether the directors had released those who were released upon terms which they were authorized to make, or whether, if they had not released them upon such terms, the release subsequently became known to the company and was sanctioned by the company. The shareholders

(1) *Spackman* v. *Evans*, Law Rep. 3 H. L. 171; *Evans* v. *Smallcombe*, Ibid. 249; *Houldsworth* v. *Evans*, Ibid. 263.

(2) Law Rep. 7 C. P. 43.

might have passed a resolution sanctioning the release, or altering the terms in the articles of association upon which releases might be granted. If they had sanctioned what had been done without the formality of a resolution, it was quite clear that that would have been perfectly sufficient. So also in the case of the *Phosphate of Lime Company* (1) the question was, whether that had been done by the sanction of the company which clearly might have been done by a resolution passed by the company. Those cases have no application whatever to the present case. The present case stands upon the power, not of the directors alone, but of the whole company as settled by the Act of Parliament.

My Lords, for the reasons which I have thus endeavoured to express, I submit to your Lordships and move your Lordships that the judgment in the present case should be reversed, and judgment entered for the Defendants.

LORD CHELMSFORD:—

My Lords, the question upon this appeal is whether the Plaintiffs in Error are liable upon a contract entered into with the Defendants in Error, or whether that contract being *ultra vires* it can be enforced against them.

The Plaintiffs in Error are a limited company incorporated under the *Companies Act*, 1862, by which any seven or more persons associated for any lawful purpose, may, by subscribing their names to a memorandum of association, form an incorporated company with or without limited liability. The 8th section of the Act prescribes what the memorandum of association shall contain, amongst other things, "the objects for which the proposed company is to be established." And by the 12th section, power is given to modify the memorandum of association in certain particulars, "but" (the section adds) "save as aforesaid, no alteration shall be made by any company in the conditions contained in its memorandum of association."

The memorandum of association by which the *Ashbury Company* was incorporated, described its objects with great particularity, the only part of it, however, to which attention need be directed is that which states that one of the objects of the

(1) Law Rep. 7 C. P. 43.

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company was to carry on the business of mechanical engineers and general contractors." The learned counsel for the Defendants in Error sought to give a very wide meaning to the words "general contractors;" but he admitted that they required some limitation, contending, however, that they extended at least to to the business of constructing railways. It appears to me that the generality of the expression is limited by its association with the previous words, "mechanical engineers," and that it ought to be confined to contracts connected with that business. In common parlance a mechanical engineer is distinguished from a civil engineer, his business being not to construct railways, but to manufacture machinery of every description. The interpretation of the language of the memorandum of association urged on the part of the Defendant in Error, even if accepted, will not in my opinion, assist him in the determination of the case in his favour:—

[His Lordship here gave a summary of the facts of the case, see *ante*, p. 654.]

As the result of these several contracts, the counsel for the Defendants in Error contended that the Plaintiffs in Error were the real contractors for the construction of the Belgian line; that the *société anonyme* was in fact the *Ashbury Company* under another name, and was only formed to enable the company to obtain the power of constructing the railway, which by the Belgian law they could not otherwise accomplish. But the facts appear to me to furnish no ground for such an argument. There is no doubt that the directors of the *Ashbury Company* were desirous of possessing the power to make the line, and for that purpose they purchased the concession and paid £26,000 of the moneys of the company in part of the purchase-money, and in agreeing to form the *société anonyme*, undoubtedly intended to have a control over their proceedings, but the stipulation as to their having the nomination of a certain number of directors and commissioners is a proof that they alone did not form the *société anonyme*. And the obligation entered into with Messrs. *Riche*, to procure for them the contract for the construction of the line, proves that the *Ashbury* directors and shareholders were not the *société* itself, or they would have given that *société* the contract, and would not have bound themselves to procure it.

The company therefore, was only in this position. Some of the directors formed part of a *société* empowered to make a railway, and to enter into a contract for its construction. Who, in this state of things, were the contractors for actually making the railway? Clearly no other than Messrs. *Riche*, who entered into the contract with the *société anonyme* to make it. Mr. *Benjamin* said that Messrs. *Riche* were the sub-contractors with the *Ashbury Company*, and that upon the principle "*qui facit per alium facit per se*," that company was the real contractor. But it is a misapprehension to assume the contract of Messrs. *Riche* to construct the line to have been with the *Ashbury Company* Messrs. *Riche* did not contract with that company but with the *société anonyme*. And, as to the maxim founded upon it, it would very much astonish a railway company which had procured an engineer to enter into a contract for the construction of the line, to learn that the company had thereby constituted itself the contractor for doing the work, and had thereby become liable for damage that might occur through negligence in its execution upon the principle of *respondeat superior*.

The position of the *Ashbury Company* in relation to the contracts is nothing more than this. The directors had purchased the concession for the Belgian railway, and paid a sum of £26,000 of the moneys of the company to the concessionaries, and afterwards entered into an agreement with the real contractors for making the railway, to supply them with funds to carry out the undertaking. Is this an object for which the company was incorporated by the memorandum of association? Great stress was laid in the argument for the Defendant in Error upon the opinion of Mr. Justice *Blackburn*, whose judgments are always entitled to respect. He considers the contract entered into by the company with Messrs. *Riche* not to be *ultra vires* upon the ground (1) that "at common law a corporation could bind itself to do anything to which a natural person could bind himself, and to deal with its property as a natural person might deal with his own." "And that if a general power of contracting is an incident to a corporation, which it requires an indication of intention in the Legislature to take away, he saw no such indication in the Act. It would be different" (he added) "if negative words had been used,

(1) Law Rep. 9 Ex. 263.

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and it had been said that the company should not do any other acts than those necessary for the purpose for which it is formed."

Now, the incorporation of a company with limited liability is entirely a creature of the statute. It was necessary, not only for the protection of those who might join such companies, but also of persons who might enter into contracts with them, that the privilege of creating them should only be obtained upon certain conditions which should be made known to the public. The Legislature, therefore, required that the objects for which the proposed company was to be established should be contained in the memorandum of association, which, when signed and registered, is to establish the incorporated company. Whether, if there had been nothing in the Act, except this clause, as to the formation of companies, they would not have been restrained from entering into contracts for other objects than those contained in the memorandum of association is a question which it is unnecessary to consider, because there is a clause which imposes that restriction in the most express terms.

Mr. Justice *Blackburn* observed that he saw no indication in the statute to take away the general power of contracting incident to corporations; but he afterwards, in mentioning the 12th section, said "it provides in express negative words that 'save as aforesaid' no alteration shall be made in the conditions contained in the memorandum of association." I do not know how stronger words than these could be used to prohibit a company formed under the statute from entering into any contract for any object beyond those mentioned in the memorandum of association.

Among the articles of association of the company, as my noble and learned friend has observed, there is one (the 4th) that an extension of the company's business beyond or for other than the objects or purposes expressed or implied in the memorandum of association shall take place only in pursuance of a special resolution. This article is entirely nugatory. I agree in what was held by my noble and learned friend, Lord *Selborne*, in *Dent's Case* (1), that, under the 12th section of the Act, articles of association professing to confer authority to modify the memorandum beyond the limited extent allowed by the Act, are simply void.

(1) Law Rep. 8 Ch. App. 776.

The real description of the contract entered into by the company is, an engagement to supply the contractors for the construction of a foreign railway with the funds necessary to enable them to execute their contract. This is clearly not within any of the objects described in the memorandum of association, and the contract was *ultra vires*, and therefore not voidable merely, but absolutely void. The learned counsel for the Defendant in Error, after arguing against the conclusion that the contract was *ultra vires*, contended that the contract having been in part performed, and the money of the company having been paid in respect of it, the shareholders, in order to have the benefit of their money, so misapplied, had a right to abstain from objecting to the contract, which might then be enforced against the directors. Because, he said, the *Companies Act*, though it prohibits the contract being entered into, does not say, if the directors have made such a prohibited contract, what the shareholders may do with it. And he enforced his argument by urging the distinction between an illegal act and an act which it is beyond the power of the directors to do, a distinction which may be exemplified by the difference between the objects for which the company is established, contained in the memorandum of association, and the regulations for the management of the company in the articles of association.

This argument is really directed to the question whether the contract was capable of being ratified by the shareholders, the consideration of which will introduce another question, whether it was in point of fact ratified.

I have already observed that the contract entered into by the company with Messrs. *Riche* was not a voidable contract merely, but being in violation of the prohibition contained in the *Companies Act*, was absolutely void.

It is exactly in the same condition as if no contract at all had been made, and therefore a ratification of it is not possible. If there had been an actual ratification, it could not have given life to a contract which had no existence in itself; but at the utmost it would have amounted to a sanction by the shareholders to the act of the directors, which, if given before the contract was entered into, would not have made it valid, as it does not relate to an object within the scope of the memorandum of association.

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The cases of *Spackman* v. *Evans* (1), *Evans* v. *Smallcombe* (2), and *Houldsworth* v. *Evans* (3), which were cited in argument for the purpose of shewing that the ratification, by the whole body of shareholders, of an arrangement which it was not competent to the directors originally to make, gave it validity, do not reach the present case. The act of the directors there was not prohibited by statute, but was merely not warranted by the deed of setttement of the company. If the contract entered into by the directors in the present case had been beyond the powers given to them by the articles of association, not being contrary to the objects contained in the memorandum of association, it might have been previously authorized or subsequently ratified by the whole body of shareholders

But, assuming that the consent of the shareholders would, in this case, have had the effect of giving life to a still-born contract, in point of fact no such consent was ever given. A ratification of the contract could only have been established by proof of the acquiescence of each and every shareholder with full knowledge of the character of the act of the directors. It was argued on the part of the Defendant in Error that, each shareholder having had notice of meetings of the company at which arrangements were made with respect to the mode of dealing with the contract, and having had the means of knowledge as to the transaction, if he chose to absent himself from the meeting he must be bound by the resolutions of the shareholders present. But I apprehend that, as Lord *Cranworth* said in *Houldsworth* v. *Evans* (4): "In joint stock companies absent shareholders should never be bound to do anything more than to assume that the directors are doing their duty." He adds: "Except in cases where they are informed that, although the directors have not intended to defraud the company, yet, exercising powers not legally conferred upon them, they have gone beyond what they ought to do." I confess it seems to me that, in every case of ratification by shareholders of an act *ultra vires* of directors, there ought to be, not a mere presumption of assent, from notice of the unauthorized act and absence from a meeting called to legalise it, but proof of the actual assent of each shareholder.

(1) Law Rep. 3 H. L. 171.
(2) Ibid. 263.
(3) Law Rep. 3 H. L. 249.
(4) Ibid. 276.

But however this may be, the present case is widely different from the one supposed. The absent shareholders never had any notice of the object of the meetings. The circular convening the meeting for the 14th of May, 1867, is relied upon as a sufficient notification to every shareholder of what was proposed to be done at the meeting. The notice which was given was this:— The meeting was called, amongst other things, "To receive, consider, and if so determined, to adopt any report or recommendation which may be made by the committee appointed at the extraordinary meeting of the company held on the 1st of May instant, to confer with the directors with the view to an agreement being arrived at on matters in dispute." Now, what information could this convey of the object of the meeting? Mr. Justice *Blackburn* said: "The balance-sheet which accompanied this circular shewed a loss, and the directors' report, also accompanying it, declared that there was no dividend. These are matters intelligible to, and likely to rouse attention in, the dullest and most careless of shareholders. I certainly feel justified in saying that there is a *primâ facie* case that every shareholder knew what it was proposed to do." I agree with the learned Judge that there was quite sufficient to rouse attention, which is a very different thing from conveying knowledge. And with great respect I think the presumption which he draws, which I understand him to mean by saying there is a *primâ facie* case, that every shareholder knew what it was proposed to do, is scarcely justified. But supposing such a presumption may fairly arise from the facts connected with the convening of this meeting, I think it would not be sufficient in this case, because, in order to imply the assent of an absent shareholder to the proceedings of a meeting called to ratify acts of directors which are *ultra vires*, it is not sufficient to presume that he had knowledge of the object for which the meeting was called, but actual knowledge must be brought home to him; and even then it may be questionable whether absence from the meeting afterwards necessarily raises the implication of assent.

It is unnecessary to consider what would be the effect of such a state of things, because I am clearly of opinion that in this case the absent shareholders had no knowledge conveyed to them by the proposed business of the meeting, and that means of know-

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ledge, or the presumption of knowledge, is not sufficient to raise an implication of assent. And therefore, if the contract of the directors with Messrs. *Riche* had been capable of ratification there is no proof that it was ever ratified.

I agree that the judgment of the Exchequer Chamber ought to be reversed.

LORD HATHERLEY:—

My Lords, I am of the same opinion. I must confess it appears to me that the case is really reduced to one of a very simple character, and the question amounts merely to this—What is the true construction of the Act of Parliament with reference to the memorandum of association, and the powers conferred upon companies associated upon the limited principle, subject to that memorandum?

As regards the first question of fact (which is introduced independently of the question of law), namely, whether or not the agreement in question upon which the suit has been actually commenced by Messrs. *Riche*, be one within the memorandum of association, it appears to me to be scarcely capable of argument; and I say this with the more confidence, because every counsel with whom the directors have advised, and every Judge before whom the suit has come, have all concurred unanimously in the opinion, that as far as regards that question of fact, or rather that mixed question of fact and law, it is certainly not an agreement within the memorandum of association. How it could possibly be brought within any of the terms contained in that memorandum, even with the aid of the ingenious arguments that we have heard at the Bar, it is very difficult to conceive; because it was admitted by those upon whom the burden was thrown of shewing that the memorandum of association would cover it, that the words "general contractors" must have some limit.

It could not be contended, Mr. *Benjamin* did not contend, that under the words "general contractors" the company would be at liberty to contract for anything in the world, such as, for instance, fire or marine insurance. That expression must be limited in some degree at least by the words that precede it, and if so limited in any degree, it would be difficult to conceive how it

could cover a contract which was not a contract to carry on the work of a mechanical engineer, which was not for supplying rolling stock and the like, which was not even for the making of the railway, but to intrust that to Messrs. *Riche Brothers*, who were to be not simply subordinate agents, but immediate contractors for the execution of the work. The contract did at one time contain one single clause as to the furnishing of rolling stock by the *Ashbury Company*, but that clause was afterwards altered, because it was discovered that the Belgian Government was unwilling to make certain concessions with reference to duty on the importation of machinery, on which remission of duty the *Ashbury Company* had calculated as a great source of profit to be derived from undertaking that part of the contract. I need say no more with reference to whether or not the contract in question, which is a contract to furnish another company altogether, the *Société Anonyme of Brussels*, with money from time to time, in order to carry into effect the works of the railway, is to be considered a contract within the scope of the memorandum of association of the *Ashbury Company*.

The only other point in the case, independent of the Act of Parliament, is the question of ratification. I confess I concur with the opinion which has already been expressed by your Lordships, that there is not anything amounting to confirmation, if it were necessary to decide that point. I do not dwell upon it, because I do not think it is necessary to determine the point—but as at present advised, certainly, after looking through all that has taken place in these transactions, I find nothing by which an absent shareholder had fair and full notice of what was contemplated to be done behind his back at the general meeting; and it appears to me that nothing took place which would bind an absent shareholder to suppose, or conjecture, that anything more was going to be done at the general meeting, than that general meeting would have the power to do under the provisions of the Act.

But I do not think we have arrived at that point, because I am of opinion, like my noble and learned friends who have preceded me, that no amount of ratification or confirmation by individual shareholders could give validity to the contract in question. That

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depends upon the Act of Parliament, which is the real point in the case. When you consider that this Act of Parliament was passed with the view of enabling persons to carry on business on principles which were, up to that time, wholly unknown in the general conduct of mercantile affairs in this country; when you consider that the general principle of partnership was, that every person entering into any partnership whatsoever, thereby subjected, before this description of legislation had been entered upon, th whole of his property, whatever it might be, to the demands of his creditors, it is impossible not to feel that when these legislative enactments, which gave power to depart from that principle upon certain conditions to be expressed in the Act of Parliament, by which companies could be framed with that view, came to be made, it was necessary that the public, that is the persons dealing with a limited company, should be protected, as well as that the shareholders themselves should be protected.

Accordingly, your Lordships will find throughout the whole of the Act of Parliament, as has been already pointed out by the Lord Chancellor, a plain and marked distinction drawn between the interest of the shareholders *inter se*, and the interest which the public have in seeing that the terms of the Act of Parliament by which the privilege of limited liability was conceded, were to be construed in such a manner as to protect the public in dealing with companies of this description. The mode of protection adopted seems to have been this:—The Legislature said, "You may meet together and form yourselves into a company, but in doing that you must tell all those who may be disposed to deal with you the objects for which you have been associated. Those who are dealing with you will trust to that memorandum of association, and they will see that you have the power of carrying on business in such a manner as it specifies, to be limited, however, by the extent of the shares, that is to say, the money you may contribute for the purpose of carrying on that business. You must state the amount of the capital which you are about to invest in it, and you must state the objects for which you are associated, so that the persons dealing with you will know that they are dealing with persons who can only devote their means to a given class of objects, and who are prohibited from devoting

their means to any other purpose." Throughout the Act that purpose is apparent. With regard to the amount of capital, which is one point that I have referred to, the Act did give a special power of variation. But with regard to the memorandum of association, that is carefully protected by the 12th section. It is provided that whatsoever other things you may do in the way of variation, a certain limited power of alteration being given to you, no such power shall you have as to the objects specified in the memorandum of association.

That being so, my Lords, one turns to the views expressed by the learned Judges, who, concurring with Mr. Justice *Blackburn*, have decided that the contract which has been entered into in this case is one by which the company has been bound. Turning to the reasons upon which they have based that opinion, one finds them very clearly expressed (as his judgments always are very clearly expressed) in the judgment of Mr. Justice *Blackburn*. His view appears to be this:—True it is that the objects to which the common seal was applied in this case by the corporation may not be such as the directors could justify to their shareholders; but then the corporation was called into being; and when the corporation was called into being you had an entity which could act by its common seal, just as any physical entity, that is to say, a human being, (as distinguished from an entity created by an Act of Parliament, in the shape of a corporation), might act through his contract. Having created that body, that entity, you cannot say the contract is void, whatsoever may be the consequences which may ensue to the persons who are affected by the action of the directors in affixing the common seal. Whatever act they may have to complain of, you cannot say that the act is void as against the persons who claim the benefit of that common seal, the power of affixing which you conferred upon them by making them a corporation.

Then he cites passages from old authorities, to shew that when once you have given being to such a body as this, you must be taken to have given to it all the consequences of its being called into existence, unless by express negative words you have restricted the operation of the acts of the being you have so created. And, my Lords, he cites for that purpose a passage,

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which has been referred to several times, from Lord *Coke*, namely, "It is a maxim" (he says) "in the common law, that a statute made in the affirmative, without any negative expressed or implied, doth not take away the common law." He quotes also another passage following it, from *Plowden*: "Affirmative words may no doubt be used so as to imply a negative." Now, I think when these two propositions are taken together and applied to the objects of this present Act of Parliament, it must be clearly seen not only that the entity, this corporation, called into existence for the purpose of trading with limited liability, enjoys, by affirmative words, the objects for which it was called into being, those objects which are specified in the memorandum of association; but here you also find express negative words, providing that, "save as aforesaid, no alteration shall be made in the conditions contained in the memorandum of association." That is a distinct limitation by way of negative of the powers or authorities which you have conferred upon this entity. You say: We confer upon this corporate body the power of acting according to the memorandum, but we also say that that memorandum shall never be changed. I think it is far too nice a refinement to say that that is not equivalent to saying in so many words, "The objects of the memorandum are your objects, and no other ever shall or can be your objects."

Now, if it were not for the refinement that is drawn in the distinction which, as I understand it, is the distinction applied to this case by Mr. Justice *Blackburn*, we should have that learned Judge with us in our opinion. But he appears to me to make a distinction by saying, "Here is this company formed for the purpose expressed in the memorandum of association." That is in the affirmative; and I do not say you shall never act for any other purpose, or with any other end, or that any action which you do with any other end shall be void. All that the Legislature has said, as he states it, is this: You shall be gathered together; and, according to the 10th section, the memorandum shall contain the objects with which the proposed company shall be established. That is in the 10th section; that is affirmative; and then the only other words, he thinks, are these expressly negative words as to your changing the memorandum, namely, that you shall never

change that memorandum. But he does not consider that, as I understand it, to be an express negative to your doing anything inconsistent with that memorandum. I confess, my Lords, that is a refinement that I am not disposed to adopt.

With regard to the object which the Legislature had in view, I think that the Legislature had in view distinctly the object of protecting outside dealers and contractors with this limited company, from the funds of the company being applied, or from a contract being entered into by the company, for any other object whatsoever than those specified in the memorandum of association, which the Legislature thought should remain for ever unchanged. It is quite true, as was said in the argument, that those same gentlemen who signed the memorandum might, the next hour if they liked, go into another room and frame a new object of business besides those specified in the memorandum of association they had already agreed to. I only say in answer to that, they might sign a fresh memorandum and form a new company. The same seven gentlemen may form half-a-dozen companies if they think proper, and half-a-dozen memoranda of association may be executed for that purpose. But each would be a perfectly new company in that case, and neither as regards their shareholders, nor still more as regards the general body of the public, have they the power and authority under the Act of Parliament of combining together as a corporation with limited liability, to carry on business for any other purpose whatever than that specified in the memorandum of association.

Now, my Lords, we listened to an ingenious argument by Mr. *Benjamin*, and certainly I followed it with great interest, in which, feeling the pressure of the case in reference to the act which has been done, he endeavoured to put this before us, *Fieri non debuit sed factum valet.* He said: "Suppose I have to concede"—as he must concede, of course (he argued first one point and then the other, and having finished his argument on the point as to whether or not this contract was *intra vires* of the company, he proceeded to this)—"that the original contract was invalid, still the subsequent arrangements by which the shareholders endeavoured to make the best they could of the difficult situation in which their directors have placed them, might be taken to be valid." That

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may have been done, as he said, not for the purpose in any way of evading the Act of Parliament, but rather the contrary, to bring things back to such a state and condition as the law would allow, and to make the best of what had been the misfortune of the company. I apprehend, my Lords, that no such principle can be adopted as that, the directors having committed an unlawful act, and then taken the proper course, as it appears to me, in proposing, as they did, by the instrument of the 24th of December, 1867, to take the whole burden and responsibility upon themselves, the very proper act which they then did, could give any validity whatsoever to that supposed contract.

My Lords, I have said all I have to say with reference to the supposed ratification. Holding, in the first place, that nothing could be done by the whole company to confirm the contract, I certainly should not be disposed to attach the weight, which was attached in the argument, to the deed of the 24th of December, 1867, which I have already mentioned as a confirmation, merely from the circumstance that there is a provision in that deed that the company shall do all in its power to hand over, or assist in handing over, to those who took, as they ought to take, the burden upon themselves (namely, the directors) of restoring the funds of the company and placing all *in statu quo*. They say, nothing in this deed contained shall for a moment justify you in the assertion that we are at all confirming or assenting to that contract. I say, therefore, that any such construction of the deed would seem to become scarcely capable of being soundly supported in argument, although it occurred to me, while it was being argued, that it might rest upon some such foundation as the decisions upon those instruments in which a trustee named in a deed, and desirous of disclaiming, has been ill-advised enough, instead of disclaiming *simpliciter*, to convey the trust property to others, in which case he has been held liable; because it has been said, "You could not convey it without having it once in you, and you could only take it subject to the trust." I supposed at first that that sort of argument might possibly be adduced in support of such a view as this.

But it really could have no effect upon this ground: I apprehend that the true construction of that deed is this, that the deed

provides that whatsoever rights they might have acquired in consequence of the directors dealing with his property, or in consequence of strangers dealing with them attempting to take advantage of the contract, knowing that the moneys of the company had been employed in a manner which was *ultra vires*—that those rights should not be enforced—when a stranger has taken the money of the company which ought to have been applied in one way, knowing it ought to be so applied, and applied it in another way; that money is ear-marked for the original purpose, and can be followed as against that stranger with any advantages that he may have derived in consequence of the improper contract which has been made. That being the case, I should read that instrument, if it had to be construed at all, as an admission on their part that, repudiating and rejecting altogether that contract, if they had any right whatever of that description which I have mentioned, namely, a right of following their own money when it is misapplied into that which has been procured by means of its misapplication,—if any such rights they had, they would not exercise them.

Perhaps, however, it is unnecessary for me to enter into that point, considering that I hold, as I certainly do, upon this contract, that it was one which no body of shareholders had power to ratify, or could if they were to meet together possibly ratify, it being by the 12th section illegal and void, as being contrary to the purpose for which, and for which only, power and authority was given by the Legislature, and any other purpose being one which the Legislature has, according to my view of the case, by the clauses that I have referred to, expressly and distinctly prohibited.

LORD O'HAGAN:—

My Lords, I am clearly of the same opinion. The case, which has been argued with great ability on both sides, depends for its result on the answers to three questions. First, were the contracts we have to deal with *ultra vires* of the directors? Secondly, if they were, was it possible to ratify them through the action of the shareholders? Thirdly, were they, in fact, so ratified? The facts having been made very familiar to your Lordships by my

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noble and learned friends who have preceded me, I shall content myself with briefly indicating the conclusion to which I have arrived.

On the first question, I think, notwithstanding the very ingenious reasoning of the counsel for the Defendant in Error, that the contracts in controversy were clearly *ultra vires* of the directors of the company. Indeed, this was the view of the directors themselves, and of their legal advisers; and I do not find that any of the learned Judges in the Court of Exchequer or the Court of Exchequer Chamber refused to adopt it. I cannot agree with the contention that the memorandum of association is not to be interpreted according to the ordinary rules of construction; and, so construed, it seems to me quite plain that the words "general contractors" cannot be held to indicate the possession, by the persons so described, of unlimited authority to enter into any sort of contract. Considering the description of the company contained in the first paragraph of the memorandum, and the immediate context which identifies them with "mechanical engineers," and points distinctly to the boundaries of their action, I have no doubt that their powers were confined to the making and completion of contracts connected with mechanical engineering, and the various objects, the selling or lending railway carriages, railway plant and rolling stock, and the purchases ancillary to and necessary for their proper business, which are specified in the 3rd clause of the memorandum before and after its employment of the description "mechanical engineers and general contractors."

The rule "*noscitur a sociis*" was never more clearly applicable, and its reasonable application was never more clearly necessary if we would give any practical effect to the memorandum in connection with the Act under which it was framed. That Act gave certain privileges and imposed certain conditions, and one of them was, that the memorandum of association should specify the objects of men seeking to trade with limited liability, for the manifest purpose that those objects should be clear and definite, and known precisely to all who might have dealings with the company. But if, in a case like this, it were competent for persons making and registering such a memorandum to segregate particular words, as "contractor" and "merchant," and insist that their generality

should be confined not by the declared purposes of the formation of the company, not by the conterminous phraseology, nor even by the manifest reason of the thing, the purpose of the Act would be defeated, and the favour given by it would be enjoyed without fulfilment of the condition properly imposed for the public benefit. To hold that in such a case, and with such a memorandum, a company describing itself as the *Railway Carriage and Iron Company* should be at liberty to contract for the clothing of the army, or to trade in diamonds from *Natal*, would seem to me to nullify the statute alike in its policy and in its terms.

Having therefore no doubt that the action of this company was *ultra vires*, I confess I have as little that there was no valid ratification of the impeached contracts. Again, we must keep in mind the purpose of the legislation with which we are dealing. It was, as I have said, to give a privilege upon a condition; and the privilege was to be enjoyed upon the terms and with the limitations indicated in the memorandum of association. That memorandum, when put on record, was to be, for contractors, for creditors, and for all the world, a reliable description of the exact character, purposes, and powers of the company described in it. And the admission of an authority in shareholders to warrant anything inconsistent with that character, antagonistic to those purposes, and beyond those powers (and in this case it was so undoubtedly), would seem to encourage evasion of the statute to abrogate the condition, whilst continuing the privilege, and so to give the benefit without the burthen. By the memorandum the general community is to judge of the association; but how can that be so if shareholders, proposing to bind a corporation by resolutions, perhaps effective between the shareholders themselves, altogether ignore that memorandum, and authorize dealings quite beyond the scope of its contemplation? It is plain that if the ratification for which the Defendant in Error contends, could validly affirm the contracts on which he relies, there is no amount of divergence from the original object of the company which might not have been approved, no extension of the limits prescribed by the memorandum which might not have been effected by a simple resolution of all the shareholders. And if this be so, I cannot think that a conclusion pregnant with consequences so very serious, can properly

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be sustained. It is not warranted by the statute, which equally condemns it by negative and affirmative provisions; and any such ratification if relied on, being in clear contravention of the purpose and the letter of the law, should in my opinion be held void and illegal.

This disposes of the second question and concludes the case, but it is right to say on the third point that, whatever may be the possibility or impossibility of legal ratification, I do not think any ratification was in fact accomplished by the shareholders. Assuming the contracts to have been *ultra vires*, we must cast on the Defendant in Error the *onus* of shewing that they were validly ratified; and it appears to me that he has wholly failed to do so. In the cases decided in this House to which we have had frequent reference, the assent of all the shareholders was assumed to be essential to a ratification; and we may take it as conceded that such an assent, expressly or by implication, from actual presence, or at a meeting, or authority implicitly or directly given, must be proved, even if, when so proved, it would be effectual to ratify an otherwise invalid arrangement. In this case no such proof is forthcoming. The documents and records clearly shew that all the shareholders were not present at any meeting transacting business important for your Lordships' consideration; and it was admitted that they were not by Mr. *Benjamin* in his equally able and candid argument. The absent shareholders could not be bound by what was done at these meetings, unless they gave authority for it, and there is no allegation of express authority, and no ground of any kind for implying authority.

It seems quite just to say that absent shareholders are not to assume any intention of illegality, or any design on the part of the directors to transcend their legal powers. At least to found any implication of assent to the carrying out of such an intention or design, we must have evidence that notice of it was communicated. And in the case before us I fail to find any such notice. In the circulars calling the meetings there was plainly none, nor do I think there was any in the accounts and balance sheets of such a character as to put the shareholders, necessarily, on inquiry, or place them in the alternative of attending and protesting against possible irregularities, or being bound by them whatever

they might be. A passage from the judgment of Mr. Justice *Willes*, in the case of the *Phosphate of Lime Company* v. *Green* (1), appears to me to be very sound and apposite in this case: "The principle by which a person, on whose behalf an act is done without his authority, may ratify and adopt it, is as old as any proposition known to the law. But it is subject to one condition in order to make it binding; it must be either with full knowledge of the character of the act to be adopted, or with intention to adopt it, at all events, and under whatever circumstances." Now in this case, as I have said, the burthen of proof of ratification lies on the Respondent; and I find none to satisfy me, either that the absent shareholders had, in the language of Mr. Justice *Willes*, "full knowledge of the character of the acts to be adopted or the intention to adopt them, at all events, and under whatever circumstances," or indeed to adopt them at all.

On all the points arising in the case, I am therefore, my Lords, clearly of opinion that the Plaintiffs in Error are right, and that the appeal should be allowed.

LORD SELBORNE:—

My Lords, the action in this case is brought upon a contract not directly or indirectly to execute any works, but to find capital for a foreign railway company, in exchange for shares and bonds of that company. Such a contract, in my opinion, was not authorized by the memorandum of association of the *Ashbury Company*. All your Lordships, and all the Judges in the Courts below, appear to be, so far, agreed.

But this, in my judgment, is really decisive of the whole case. I only repeat what Lord *Cranworth*, in *Hawkes* v. *Eastern Counties Railway Company* (2) (when moving the judgment of this House), stated to be settled law, when I say that a statutory corporation, created by Act of Parliament for a particular purpose, is limited, as to all its powers, by the purposes of its incorporation as defined in that Act. The present and all other companies incorporated by virtue of the *Companies Act* of 1862 appear to me to be statutory corporations within this principle. The memorandum of association is under that Act their fundamental, and (except in

(1) Law Rep. 7 C. P. 56. (2) 5 H. L. C. 331.

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certain specified particulars) their unalterable law; and they are incorporated only for the objects and purposes expressed in that memorandum. The object and policy of those provisions of the statute which prescribe the conditions to be expressed in the memorandum, and make these conditions (except in certain points) unalterable, would be liable to be defeated if a contract under the common seal, which on the face of it transgresses the fundamental law, were not held to be void, and *ultra vires* of the company, as well as beyond the powers delegated to its directors or administrators. It was so held in the case of the *East Anglian Railway Company* (1), and in the other cases upon Railway Acts, which cases were approved by this House in *Hawkes' Case* (2), and I am unable to see any distinction for this purpose between statutory corporations under Railway Acts, and statutory corporations under the *Joint Stock Companies Act* of 1862.

The view of the three Judges who in the Court of Exchequer Chamber were for affirmance, was (as I understand it) that all contracts whatever (not expressly or by necessary implication prohibited), are, *primâ facie*, within the powers of all these companies merely because they are corporations, but that, inasmuch as the common seal must be affixed to their deeds by some agents having a delegated power, and as the general powers delegated to the directors and general meetings are only for the purposes expressed in the memorandum and articles of association, their agency to seal a contract going beyond those purposes cannot be presumed, unless it is made manifest by proof of the consent of every individual shareholder. With this view I cannot agree. I think that contracts for objects and purposes foreign to, or inconsistent with, the memorandum of association are *ultra vires* of the corporation itself. And it seems to me far more accurate to say that the inability of such companies to make such contracts rests on an original limitation and circumscription of their powers by the law, and for the purposes of their incorporation, than that it depends upon some express or implied prohibition, making acts unlawful which otherwise they would have had a legal capacity to do.

This being so, it necessarily follows (as indeed seems to me to

(1) 11 C. B. 775; 21 L. J. (C.P.) 23. (2) 5 H. L. C. 331.

have been conceded in Mr. Justice *Blackburn's* judgment) that, where there could be no mandate, there cannot be any ratification; and that the assent of all the shareholders can make no difference when a stranger to the corporation is suing the company itself in its corporate name, upon a contract under the common seal. No agreement of shareholders can make that a contract of the corporation which the law says cannot and shall not be so.

If, however, this contract (though contrary to the law of the association, and not within the powers either of the directors or of a general meeting) could have been susceptible of confirmation or ratification by the universal consent of all the shareholders, I should have been of opinion that there was here no evidence whatever to go to a jury of any such confirmation or ratification. What was relied upon consists entirely of resolutions passed at certain general meetings of the shareholders, and a deed executed pursuant to those resolutions. But (assuming these to be acts which might properly have been construed as acts of adoption or ratification) there is no evidence that they were ever communicated to any shareholder who was not present at those meetings, either by notice beforehand, or afterwards. The notices under which these meetings were convened contained nothing from which any shareholder could be led to suppose that it was in contemplation to enter into or adopt, on the part of the company, any contract or arrangement in excess of the ordinary powers of the company, as represented by the shareholders assembled at a duly constituted general meeting. There is no obligation upon any shareholder receiving such notices, either to attend the meetings or to make inquiries as to what is proposed to be done at them, in order to protect himself from being bound by acts or contracts *ultra vires* of any general meeting. He will, of course, be bound by all that the general meetings can do, as to the matters mentioned in the notices, within their powers; but he cannot, in his absence and without his knowledge, be taken to consent that they shall bind him by any resolutions or acts in excess of those powers, whether such acts or resolutions do or do not relate to the particular business for the transaction of which those meetings were called together.

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As to the construction placed by the majority of the Judges upon the resolutions and deed, which in this case they held to establish ratification, I only wish to guard myself against being supposed to assent to the proposition that a deed executed between the directors and their shareholders, which was not meant to be, and which, as between the parties to it, was not, a ratification by the company of the agency of the directors in transactions otherwise unauthorized, and which was never acted upon so as to alter or affect the position of the Messrs. *Riche*, could operate in their favour as a ratification of that agency.

Judgment of the Court of Exchequer Chamber reversed, and judgment entered for Defendants.

Lords' Journals, 8th June, 1875.

Attorney for Plaintiff in Error: *H. Skynner.*

Attorneys for Defendant in Error: *Stevens, Wilkinson, & Harries.*

THE DIRECTORS, &c., OF THE SWINDON WATERWORKS COMPANY, LIMITED } APPELLANTS;

AND

THE PROPRIETORS OF THE WILTS AND BERKS CANAL NAVIGATION COMPANY . . . . . } RESPONDENTS.

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June 14, 15.

Canal—Riparian Owner—Water Rights.

A company which purchases the land of a riparian owner stands in the same situation as he did with respect to the water rights connected with that land.

A canal company was established by certain Acts of Parliament. The Acts gave the canal proprietors rights as to taking water from streams within the distance of 2000 yards, for the purpose of making and maintaining the canal. They purchased a mill on a stream, from which stream they had the right to take water. In this way they became riparian owners. As such they were entitled to the flow of water from brooks and streams running into that stream, subject only to the rights which other riparian owners at the upper part of the stream might lawfully exercise.

The directors of a waterworks company purchased a mill on the upper part of the same stream, and so became riparian owners as the owner of that mill had been. They not only used the water for the purposes and in the manner allowed by law to every riparian owner, but collected it into a permanent reservoir for the supply of an adjacent town, and claimed, as their legal right, such a user of it:—

Held, that this use of the water by the directors of the waterworks company was not a reasonable use of the stream, such as could justifiably be made by an upper riparian owner, and that the canal proprietors, who were also riparian owners, whose flow of water was thereby affected, were entitled to come into equity, and obtain an injunction to restrain this use of the water.

The canal proprietors had previously sold some of the water to the inhabitants of the town and others:—

Per LORD HATHERLEY:—Though that might be in excess of the powers given the canal proprietors by their Acts, it formed no excuse for what had been since done by the waterworks company.

The rights of riparian owners on the upper and lower portions of a stream discussed and explained.

CERTAIN persons who had formed a company for the purpose of making a canal, obtained in the 35 Geo. 3 an Act (c. lii.), which empowered them to do so, and authorized them to supply the canal

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and its cuts and branches with water from all such springs as should be found in making the same, and from all "rivers, springs, brooks, streams, and watercourses whatsoever, which were or should be found within the distance of 2000 yards from any part of the said canal or cuts respectively, or from any reservoir or reservoirs belonging thereto," and to do all such works as might be necessary for carrying these purposes into effect. Other Acts were passed (especially the 1 & 2 Geo. 4, c. xcvii.) confirming these powers, and changing the name of the original company to its present form. The words of the 6th clause of this Act relating to the supply of water to the canal slightly varied from those of the first Act. They were these:—The canal proprietors were empowered "to maintain and keep navigable and passable for boats, barges, and other vessels the said canal and cuts, and for that purpose to supply the said canal and cuts respectively at all times for ever hereafter with water from all rivers, springs, brooks, streams, and watercourses whatsoever, which have been or shall be found within the distance of 2000 yards from any part of the same canal and cuts respectively."

One of the chief sources of supply to the canal (within the 2000 yards' distance) was a stream called the *Wroughton Stream* (sometimes called the *Moredon Brook*, and sometimes the River *Ray*), and the waters of that stream, flowing at the summit level of the canal, had been constantly used for that purpose. In the year 1807 the canal proprietors bought a mill on the *Wroughton Stream* known as *Wayte's Mill*. The water wheels of this and six other ancient mills were turned by the waters of the *Wroughton Stream*. *Wayte's Mill* was the nearest to the point of junction of the *Wroughton Stream* with the canal; there were other mills above it higher up the stream. The purchase was made under the authority of the original Canal Act, and the conveyance gave to the purchasers the rights of the original owner to the use of the water. The canal proprietors did not use *Wayte's Mill* as a water mill, but pulled it down.

In 1866 the Appellants formed a company (and registered it under the *Joint Stock Companies Act*, 1862), called "the *Swindon Waterworks Company, Limited*," the object of which was to supply the town of *Swindon* (now very largely increased in extent and

population in consequence of being one of the most important stations on the *Great Western Railway*), and purchased a mill called *Bedford's Mill*, situated on a stream the waters of which flowed into the *Wroughton Stream*, pulled down the mill itself, and converted the adjoining land, which to the extent of fourteen acres they had also purchased, into a reservoir; and they sank shafts for the purpose of obtaining a farther supply of water. They also erected a brick culvert and other works, the effect of which the canal proprietors alleged was to divert the water from the *Wroughton Stream*, and so injure the supply of water to which the proprietors were entitled for the use of their canal. The directors of the waterworks company entered into an arrangement to supply *Swindon* with water, and made the necessary alterations in their works for the purpose. The year 1870 was a year of drought, and the supply to the canal was thereby diminished, but the canal proprietors alleged that it was still more, and more injuriously, diminished by the water abstracted by the Appellants for their reservoir and the supply of the town of *Swindon*. [See the statements made in the judgment of the Lord Chancellor, *post*, p. 707.] A correspondence ensued between the canal proprietors and the directors of the waterworks, the latter of whom insisted on a legal right to do what they had done, and ultimately the canal proprietors filed a bill against the directors praying for an injunction to prevent the latter from continuing to divert the water from the *Wroughton Stream*, and for an inquiry and account, and for general relief.

The directors of the waterworks claimed by their answer the right as owners of *Bedford's Mill* to divert the waters in the way they had done. They denied doing any injury to the proprietors in the lawful use of water for the canal; they alleged that the canal proprietors had formerly sold water to the towns of *Old* and *New Swindon*, and still sold water to two persons, which water was not therefore required, or used, for the purposes of the canal.

A large body of evidence was taken, and the cause came on to be heard before Vice-Chancellor *Malins* on a motion for a decree, and on the 3rd of December, 1873, His Honour directed the bill to be dismissed with costs. On appeal to the Lords Justices this decree

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was reversed, and an injunction was granted (1). This appeal was then brought.

Mr. *H. Fox Bristowe*, Q.C., and Mr. *W. W. Karslake* (Mr. *Thesiger*, Q.C., with them), for the Appellants :—

The Respondents must found their claim here upon the words of the Acts authorizing the making and the maintenance of the canal. Those Acts do not warrant that claim, and it cannot be sustained on the ground that the Respondents are riparian owners, for they are not so in the sense in which that term is properly used. They bought the mill of a riparian owner, but they have not continued it in its original use, and their rights, therefore—though a riparian owner might grant his rights as such to another person, *Nuttall* v. *Bracewell* (2)—had been abandoned. Whatever rights they claim must, therefore, depend on their Acts of Parliament. They are a mere parliamentary company founded for a given purpose, and they cannot claim in respect of any character obtained from the purchase of *Wayte's Mill*. But if so, then, whatever may be the streams from which they are allowed to draw water to supply their canal, they are only entitled to draw so much as will supply it, for instance, so many thousand gallons a day, and supply it for its purposes as a canal, but not to sell the water, or for any other purpose : *National Manure Company* v. *Donald* (3). They are not entitled to use the water for any other purposes than those specified in their Acts: *Rochdale Canal Company* v. *Ratcliffe* (4). If so, there can have been no injury inflicted on them, for they have not been deprived of anything to which they were lawfully entitled. If they get as much water as will enable them to work their canal, they get all that the Acts meant to give them. Now the evidence shews that for a long time they have sold water—which was, of course, in excess of what was required for the canal—to the *Great Western Railway Company*, its servants and workmen, and certain persons in *Swindon*, and they even sell it now to at least two tradesmen of the neighbourhood. Such a sale is not

(1) Law Rep. 9 Ch. Ap. 451. See p. 462, where the form of the minute is printed.

(2) Law Rep. 2 Ex. 1.

(3) 4 H. & N. 8.

(4) 18 Q. B. 287.

within the purpose of making and maintaining a canal for which alone their powers were given them, and is not authorized by their Acts. All their rights were given to them in trust for the benefit of the public—a benefit of a particular sort, fixed and settled by Parliament. They cannot be protected in these rights when they seek to employ the water in another and different manner, and for their own sole profit. The Court will take these circumstances into consideration in determining whether they are entitled to the special relief they are now seeking: *Clarke* v. *Clark* (1).

No real injury to the Respondents, as owners of *Wayte's Mill*, the only character in which they could have a pretence to come into a Court of Equity, has been established by the evidence here. They really are not riparian owners, and have not suffered any loss of rights and advantages as riparian owners; and their bill, which was not maintainable by them as mere canal proprietors, was therefore properly dismissed by the Vice-Chancellor.

The Appellants' reservoir was at a considerable distance from the Respondents' canal, and was not even on the banks of the stream from which they claimed to draw their supply of water. Now the Legislature which gave the Respondents the right to take water from streams within 2000 yards' distance, gave them a fixed and limited space for that purpose, and did not intend to make riparian owners (and such the Appellants are), who might be several miles up the river, suffer from a diminution of water in order to contribute to the Respondents' profits.

Mr. *J. Pearson*, Q.C., and Mr. *C. M. Roupell*, for the Respondents, were not called on, except with relation to the form of words used in the decree below.

THE LORD CHANCELLOR (Lord *Cairns*):—

Your Lordships desired to hear a few observations with regard to the form of the decree; not, I think, because there was any doubt as to the correctness in point of substance of the judgment of the Lords Justices, but because the decree had, probably *per incuriam*, assumed a form which was scarcely apposite, having regard to the nature of the issues which were raised.

(1) Law Rep. 1 Ch. Ap. 16.

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My Lords, the questions which are raised in the present case are, no doubt, questions of very considerable importance to the parties; but they are questions which appear to me not to be attended with any real difficulty. The Plaintiffs in the suit, the canal company, came into the Court of Chancery complaining of an injury which had been done to them in a two-fold capacity. In the first place, they were a canal company established under Acts of Parliament, now of considerable antiquity, for the purpose of making and maintaining a canal navigation in the usual mode and form. They pointed to those Acts of Parliament, to which I shall afterwards have occasion to refer your Lordships, as their charter, under which they were entitled, in the first instance, to make their canal and to obtain a certain amount of supply of water for the purposes of their canal, and they complained that having made their canal, and having obtained, by means of streams which they were authorized to press into their service, a sufficient supply for their canal, one of those streams had subsequently been interfered with, and diverted by, the present Appellants, who were owners of land higher up upon the stream.

But, my Lords, they had a second complaint to make. It appears that near their canal, but higher up, upon the course of the stream in question, there had been a riparian tenement, which was called in the argument by the name of *Wayte's Mill*, and that the canal proprietors had purchased this tenement with all its rights, and that they had done this lawfully, being authorized by their Act of Parliament to make their canal and hold the property, and to take it, either for the purpose of enjoying it or for the purpose of reselling it. The tenement which they purchased was, as I have said, a riparian tenement; the stream in question passed through it. In point of fact, at the time it was purchased the stream was used for the purpose of working a mill placed on the tenement, and the canal proprietors under their Act of Parliament, if they had been so minded, might have continued to use that mill as a mill. The Plaintiffs in the suit (the present Respondents) therefore said that, as to this tenement of theirs, the acts which they were complaining of not merely interrupted the flow of water to the canal, but interrupted the flow of the water in its usual course to the tenement in question. They complained.

therefore, that the rights which had been given by Parliament for the purpose of making and maintaining the canal had been interfered with, and farther, that their rights as riparian owners had been interfered with by the operation of the Defendants (the Appellants) higher up on the stream.

My Lords, what the Appellants were doing was this: they were, as I have said, owners at a considerable distance up the stream in question; they had taken possession of the water of the stream higher up; they had altered the channel of the stream, and they had made a reservoir into which they collected and poured all the water of the stream.

My Lords, the alteration of the channel of the stream, or even the collection of the water of the stream into the reservoir, would not of itself, or need not of itself, have been any injury to the owners lower down the stream, because it might well be that, notwithstanding that alteration of the channel and that temporary collection of the water into the reservoir, the natural flow of the stream might have been restored and the waters continue to come down as they had done before.

But, my Lords, the alteration of the channel and the collection of the waters into the reservoir were not made for the mere purpose of detaining the water for a short time and afterwards restoring it, but for a wholly different purpose. They were made for the purpose of supplying a considerable and increasing town in the neighbourhood, namely *Swindon*, with water; a purpose extremely desirable and laudable, but one to be attained not by violent means, or means not warranted by law, but by legal means.

That, my Lords, therefore raises in the first place, before adverting to the Parliamentary position of the canal company, the question whether a proceeding of this kind, that is to say the user of a running stream by an upper owner for a purpose such as I have indicated, is a lawful user of the stream as against the owner of a tenement lower down the stream. The law of this country as to the rights of upper and lower riparian owners is so well settled in its general aspects, that I need only remind you of the general features of that law, without referring to any of the authorities which have been cited at the Bar.

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Undoubtedly the lower riparian owner is entitled to the accustomed flow of the water for the ordinary purposes for which he can use the water, that is quite consistent with the right of the upper owner also to use the water for all ordinary purposes, namely, as has been said *ad lavandum et ad potandum*, whatever portion of the water may be thereby exhausted and may cease to come down by reason of that use. But farther, there are uses no doubt to which the water may be put by the upper owner, namely, uses connected with the tenement of that upper owner. Under certain circumstances, and provided no material injury is done, the water may be used and may be diverted for a time by the upper owner for the purpose of irrigation. That may well be done; the exhaustion of the water which may thereby take place may be so inconsiderable as not to form a subject of complaint by the lower owner, and the water may be restored after the object of irrigation is answered, in a volume substantially equal to that in which it passed before. Again, it may well be that there may be a use of the water by the upper owner for, I will say, manufacturing purposes, so reasonable that no just complaint can be made upon the subject by the lower owner. Whether such a use in any particular case could be made for manufacturing purposes connected with the upper tenement would, I apprehend, depend upon whether the use was a reasonable use. Whether it was a reasonable use would depend, at all events in some degree, on the magnitude of the stream from which the deduction was made for this purpose over and above the ordinary use of the water.

But, my Lords, I think your Lordships will find that, in the present case, you have no difficulty in saying whether the use which has been made of the water by the upper owner, comes under the range of those authorities which deal with cases such as I have supposed, cases of irrigation and cases of manufacture. Those were cases where the use made of the stream by the upper owner has been for purposes connected with the tenement of the upper owner. But the use which here has been made by the Appellants of the water, and the use which they claim the right to make of it, is not for the purpose of their tenements at all, but is a use which virtually amounts to a complete diversion of the stream—as great a diversion as if they had changed the entire

water-shed of the country, and in place of allowing the stream to flow towards the south, had altered it near its source, so as to make it flow towards the north. My Lords, that is not a user of the stream which could be called a reasonable user by the upper owner; it is a confiscation of the rights of the lower owner; it is an annihilation, so far as he is concerned, of that portion of the stream which is used for those purposes, and that is done, not for the sake of the tenement of the upper owner, but that the upper owner may make gains by alienating the water to other parties, who have no connection whatever with any part of the stream.

Therefore, my Lords, so far as regards the position of the Respondents as riparian owners, it appears to me that they clearly have a right to complain of that which is done by the Appellants, if what is so done by them is insisted upon as a thing which they have a right to do. I put this qualification, because, if, when the attention of the Appellants had been called to what they were doing, they had not insisted upon doing it as a matter of right, I can well understand that if the Court of Chancery found (I still speak of the position of the canal proprietors as riparian owners) that no sensible damage had occurred to them, it might not have thought it necessary to interfere with them by an injunction or declaration. But what your Lordships find here is that even upon this point of ownership, when challenged by the Respondents, the Appellants have made this claim, "We admit that we intend (unless enjoined by injunction from so doing) to continue the diversion of the said *Wroughton* stream into our said reservoir, for our own purposes and profits, whenever the demand on us for water requires us so to do."

My Lords, after that it appears to me that it is impossible that the Court can do otherwise than decide the issue which is thus raised between the parties. It is a matter quite immaterial whether, as riparian owners of *Wayte's* tenement, any injury has now been sustained, or has not been sustained by the Respondents. If the Appellants are right, they would, at the end of twenty years, by the exercise of this claim of diversion, entirely defeat the incident of the property, the riparian right of *Wayte's* tenement. That is a consequence which the owner of *Wayte's* tenement has the

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right to come into the Court of Chancery to get restrained at once, by injunction, or declaration, as the case may be.

That is all I have to submit to your Lordships as regards the riparian owners, the Respondents, except this, that I cannot give any weight at all to the argument which at one time was attempted to be addressed to your Lordships, that because this canal company which owned *Wayte's* tenement was a parliamentary company created by Act of Parliament, and created for the particular purpose of making and maintaining the canal, therefore it was in some way fettered in the ownership of *Wayte's* tenement; that is to say, that *Wayte's* riparian tenement had not, in the hands of these Respondents, all the incidents and accompaniments of a riparian tenement which it would have had in the hands of a private individual. My Lords, I cannot for a moment concede that point. The Respondents were the lawful owners of *Wayte's* tenement; every incident of property which properly belonged to *Wayte's* tenement was in their hands. If otherwise, they might hold for upwards of twenty years, and not being able, according to the argument which I am meeting, to exercise certain rights of ownership which otherwise would belong to it, at the end of twenty years when they passed the tenement into other hands, they would have to pass it stripped of these very rights, of the most valuable character, which it once had possessed.

Now I turn to the position of the canal proprietors under their parliamentary powers. All I have to submit to your Lordships upon that point is this:—They were entitled under their Acts of Parliament to maintain and keep navigable the canal; for that purpose to supply the canal with water "from all rivers, springs, brooks, streams, and watercourses whatsoever," which had been or should be found within a distance of 2000 yards from any part of the canal. My Lords, the water of the stream of which we are speaking was found, was in existence, was flowing, when the canal was made, within the 2000 yards. It appears to me the canal proprietors had the right then and there to take that water for the supply of their canal. If, in taking that water for the supply of their canal, they stopped it from flowing in its accustomed course to any tenement lower down upon its course, they would be

obliged to compensate the owner of that inferior tenement under their Act of Parliament.

My Lords, with regard to the upper owners, it appears to me that the canal proprietors stepped into all the rights which a riparian owner at their point in the stream would have, as against the upper owners, with this qualification, and with this only, that these rights were to be exercised, not absolutely, not capriciously, but merely and only for the purpose of supplying their canal. Therefore coming to complain, under their parliamentary powers, they must shew that something has been done by the upper owners which has interfered with the supply that their canal properly derived from this stream. My Lords, have not the Respondents shewn that in this case? The bill was filed in the year 1870. The year 1870 was, no doubt, a year of unusual drought; but in that year, it appears by the evidence, which I need not trouble you by reading, that the supply of water to the canal was undoubtedly defective. Heavy traffic — traffic of barges laden heavily, requiring a large draught of water—had to be refused on account of the insufficient supply of water in the canal. It has been said that the depth of the water might have been increased by dredging. That is met by the evidence which states that it might have been increased in depth by dredging by nine inches, but that an increase of two or three feet in depth was necessary in order to have accommodated the traffic. How did that deficiency of supply arise? No doubt the evaporation and absence of influx owing to the dryness of the season had something to do with that. But it stands upon the evidence without contradiction, without any impeachment upon cross-examination, that a considerable reason for the deficiency of the supply was, that at that very time the Appellants had taken possession of the upper part of the waters of the stream and diverted those waters for the supply of *Swindon*. There was, therefore, upon the filing of the bill, as it appears to me, a case clearly established, that the supply of water for the canal, arising out of the stream, was deficient, and was made deficient by, or at all events partly by, the acts of the present Appellants.

My Lords, in that state of things it appears to me that undoubtedly the canal proprietors had a right to come into a Court

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of Equity, and having a right to come into a Court of Equity, they find themselves, again, upon this point also, met by the challenge which I have already read as to the question of riparian ownership. They were met there, again, by the assertion of the right, that the Appellants intended to continue the diversion of the *Wroughton Stream* into their reservoir, for their own purposes and profits, whenever the demand for water required them to do so. It was high time, upon the face of that, that the canal proprietors should have their rights declared in a Court of Equity.

Now that being so, it appears to me that in substance the determination of the Lords Justices was entirely correct. I have pointed out, in the course of the argument, a want of precision and appositeness in the words comprised in the declaration contained in the decree; and what I would submit to your Lordships is, that an alteration in this respect should be made in the decree, not an alteration which will interfere with the right to the costs of the suit, for it appears to me that the Respondents are entitled in substance to succeed and to have the costs of the suit, and should therefore not be injured in any way with regard to the costs of the appeal.

The decree, as I submit to your Lordships, should run thus:— [His Lordship read the form of order he proposed, as it was afterwards entered on the Journals, see *post*, p. 715.]

I submit to your Lordships that that alteration ought to be made in the form of the decree, and that then the Appellants ought to pay the costs of the appeal.

LORD HATHERLEY:—

My Lords, I entirely concur in the proposal which has been made by my noble and learned friend the Lord Chancellor, for the affirmance of this decree with the variation that has been suggested.

In truth, my Lords, when the propositions both of law and of fact are sifted (and the case has been well sifted and fully argued in the very able address of Mr. *Bristowe*), the case appears to me to be one of the simplest possible character, guided as we are by the light of previous authority.

It is quite clear and settled, and has not been, and could not be,

disputed, that the right of the lower proprietor upon every stream is to have the ordinary flow of that stream for all the ordinary purposes connected with his tenement, unaffected by any user other than an ordinary user of the stream by a proprietor above him for the purposes of *his* tenement, qualified, possibly, by the remarks which have been made in some of the decided cases, as to a possible right of user by the higher owner for certain extraordinary purposes. I do not think it necessary to pursue the question as regards those extraordinary purposes, because certainly the purpose for which the Appellants have been using the water above, and the right they have claimed of using the whole of the stream as they think proper, as between them and the Respondents in this case, render it unnecessary to consider anything more than I have before stated, namely, the right of the lower proprietors to be unaffected by any user higher up the stream, except an ordinary user. The singular user claimed in this case by the Appellants is a right to divert into their reservoir the whole or any part of those streams which feed the *Wroughton Stream*, or the River *Ray*, —which is a stream to which the Plaintiffs are entitled for certain purposes, under Act of Parliament—to divert the whole, or any part of them, if they think fit, not for any user connected with the right of ownership or property which they have in the stream, but for the purpose of handing over and selling that water to the town of *Swindon*, diverting it altogether from its course along the stream, withdrawing it from that course, and passing it over into a totally distinct channel, for the purpose of the water supply of the town of *Swindon*.

My Lords, a good deal has been said by counsel at the Bar as to the different position of the canal proprietors, who were the Plaintiffs in this particular case (now the Respondents), from that of ordinary riparian proprietors; and an attempt has been made to insist on this singular right of user and diversion of the stream as against the Respondents, on the ground that they cannot claim to be in the position of ordinary riparian proprietors. The Appellants say: You are established as a company for one purpose, and one purpose only, namely, that of making and maintaining a canal; you are entitled to just so much water, and no more, as is necessary for the purpose of filling that canal when made, and if we

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can shew by our evidence that you have already all the water that is necessary for that purpose, then nothing that we have done concerns you, however much it might concern any other riparian proprietor on the stream.

The answer to that is twofold. First, the Respondents are riparian proprietors in the strictest sense, in respect of property they have purchased on the stream in question. They have purchased the property called "*Wayte's Mill.*" They were authorized, indeed I may say in some instances required, to purchase property of that kind for the purposes of their canal. Nobody disputes that the property was lawfully purchased by them; nobody disputes, or can dispute, that they were lawfully entitled to hold it in the same manner as the previous riparian proprietor held it. Having a right to purchase it under the Act of Parliament, as they had, they had a right to purchase it with all its rights and incidents. It does not follow from the mere fact of the mill having been taken down, and the water not being required for the particular purpose of turning the wheel of the mill, that they, as riparian proprietors, are placed in a different position from that of any other riparian proprietor. That is the first answer to that argument.

The next answer with regard to their position as canal proprietors is, I apprehend, this. Here is a great public work authorized to be constructed—a work which the Legislature contemplated, at the time, might have a long continued existence. It has now existed for nearly eighty years, having been made, I assume, soon after the passing of the Act; and whatever may be its present condition, it is still in existence as a navigable canal. The Legislature contemplated not only the formation of the canal, but the enlargement of it. The first clause of the first Act gives them authority to make the canal, and to convey "all manner of materials" necessary for making it; and then they are declared to be at liberty to use the lands they have purchased for the "altering, repairing, amending, widening, or enlarging of the said canal and cuts." The Act says that they may take land, and, to the extent of the land they take, they may, for the future navigation of the canal, require larger powers, and they are to be entitled to use them. Then, for the purpose of filling this canal with water

when made, they are authorized to take the water of all streams within 2000 yards of the canal, and to carry the water of those streams into the canal for the purpose for which they would require it, namely, filling the canal. This, no doubt, might put them in a different position as riparian proprietors from other riparian proprietors, because, as contrasted with the general right which other riparian proprietors are entitled to insist upon, namely, the continuous flow of the stream to them in its accustomed manner, this clause gives to the canal proprietors a particular right. For the purpose in question, namely, the making of the canal and the keeping it filled from time to time, either in its then state or in its enlarged state, as it might happen to be enlarged, and either for the existing navigation, or for any navigation which might come on it, they were entitled to have this canal adequately and properly supplied with water. And when it is attempted, as in the case ingeniously put by Mr. *Bristowe*, to compare it to an actual limitation of water to so many thousand gallons a day, the answer is that the Legislature has not so limited the supply, and therefore the Legislature not having so limited it, we must take the larger purpose for which it was granted, namely, the continuous use of the water for the purposes of navigation. In that case the canal company would have the right which every riparian proprietor would have, namely, a right to the flow of the stream for the purpose of satisfying their requirements.

Again, my Lords, how can you apply to such a state of things as that, the right, insisted on in the answer of these Appellants, of diverting all or any part of the stream to purposes entirely alien to their own position as riparian proprietors, and to the purposes for which a lower proprietor may have the right to use the water? The only way in which the Appellants try to make out that there is really an adequate supply of this water, and that nothing they have done has had the effect of diminishing the supply, is by shewing that the canal proprietors at one time did what the Appellants are now doing, namely, sold water to the *Great Western Railway Company* for the purpose of supplying with water the engines machines, locomotives, and workmen of that company. They may have thereby done a very wrong thing. It may be that they were doing a thing which, it strikes me at this moment, so far as it is

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necessary to express an opinion upon it without very particularly considering it, was not within the powers of their Acts; but what has that to do with their position as regards the Appellants? Those lower down the stream than the Plaintiffs might possibly, if they had thought fit, fairly have complained of it as *ultra* the canal proprietors' powers, that any of the water, if it were superfluous, should be diverted from this stream unnecessarily, and not handed over and passed on to them, but it could not infringe on the rights of those in the upper part of the stream.

There is no evidence whatever in this case that the quantity of water supplied by the Respondents for other purposes than the purposes of traffic, had in any way imposed a larger or heavier burden on the proprietors higher up the stream than that which was already imposed upon them by the ordinary law of the land. In the first place, it is not clearly made out that the water which may have been afterwards sold to the *Great Western Railway Company* had not already done its work in the canal and was no longer wanted for the canal purposes, and was not therefore demandable by them as water they were entitled to receive from the stream in question, and which might well be afterwards disposed of in a way which might not be legitimate as regards the lower proprietors, but which the higher proprietors could have nothing to do with. And in the next place, it does not appear that that interference with the traffic of the canal, which is made out by the evidence of the canal proprietors in this case, is at all skaken by any thing which has been done by the putting away of some water which may or may not have been necessary for other purposes. It is not shewn that that water is at all equivalent, or indeed approximately equivalent, to the quantity of water which these Appellants claim a right to intercept.

My Lords, I think enough has been made out to justify the interference of a Court of Equity in this case. A very slight case indeed would be sufficient after what the Appellants have said. They have claimed the absolute right to sweep away the whole of the stream from the canal by the diversion they have made in the neighbourhood of their works and their reservoir. A very slight amount of evidence of the actual amount of damage done would be sufficient to justify an injunction; and the declaration of right

to be made by the Court is absolutely necessary, in consequence of the assertion of right made by the Appellants in this case, which is wholly contrary to the right asserted by the Respondents, and which, if established, must give them a right to have it determined, ascertained, and declared against persons who, like the Appellants, profess their intention to dispute and to invade that right unless they should be interfered with by the injunction of the Court.

My Lords, in that state of circumstances I confess I think there is, upon the whole case, no difficulty in coming to the conclusion at which my noble and learned friend has arrived.

My Lords, there is a bye question of a singular character raised by the Appellants in this controversy which, I think, fails altogether as a substratum for the argument which it has been attempted to found upon it. It is said that there is one clause (the 23rd) in the Act of 1 & 2 Geo. 4, which provides that nothing in that Act contained shall authorize the canal company to divert any stream in such a manner as that the water which would otherwise flow into the *Thames* or the *Isis* shall be conducted into the River *Severn* by turning the water shed, and then it is said that some of this water by going into this stream, which is a stream running into the *Thames*, finds its way to the summit level, and in that manner finds its way down, on the other side of the summit level, into the *Severn*. But, my Lords, I understand that whatever is done in that way was done before the Act of Geo. 4 was passed; and although all the Acts anterior to that of Geo. 4 are repealed, they are repealed subject to the provisions contained in the repealing clause, which expressly confirm all previous conveyances, acts, matters and things done before the passing of the Act. I may not have correctly followed this part of the argument, for I confess it was a little more subtle than admitted of a very easy and close following; but, as far as I understood it, it was this: This act has been done, and all that the Act of Geo. 4 says is: You shall not do any act by virtue of this Act which would have the effect described. I do not understand that this has been done under the Act of Geo. 4. It has been done under previous Acts, and the previous Acts are not repealed as far as what has been done is

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concerned. If so, I do not see how that clause can have any bearing on the controversy between the parties.

With reference to the argument pressed on us by Mr. *Bristowe*, over and over again, if I may say so, (and I say it without complaining of it, for the point was an important one to his clients,) that the Act could have no intention of varying the rights of proprietors several miles up the river, when it gave them power only to take streams which were within 2000 yards of the canal; the answer is this: The Act does not affect or take away in any way the rights of those higher proprietors. They are just as they were before; they were bound, as regards those lower down the river, not to do any act so as to interfere with their enjoyment of the river, such as is here complained of; and all that happens to them is that there is the substitution of the canal proprietors for the riparian owner; not, as has been said, with all the rights of riparian proprietors, but with certain rights limited to the purposes of their canal traffic, without in any way interfering with the higher proprietors.

My Lords, I think upon the whole that this is a very proper case for giving the remedy which has been suggested by my noble and learned friend on the woolsack.

LORD SELBORNE:—

My Lords, I am of the same opinion with my noble and learned friends. The moment it is understood that the whole body of water flowing from the seven springs in a defined channel (which in the evidence was the principal source of supply to the *Wroughton Stream*) was intercepted and cut off by the Defendants in the year 1870, and for some time afterwards, and not afterwards returned into that stream, and that the Defendants claimed, on the record, a right to do this whenever they pleased for their own profit as a waterworks company, the right of the Plaintiffs to relief is clear. No authority was, or could be, cited in favour of the right so to cut off the principal source of supply of water to a stream as against lower riparian proprietors; and, so far as the statutory right of the Plaintiffs to the use of this water for the supply of their canal is concerned, it is plain, upon the

evidence, that this diversion of the water had (as it necessarily must have had) the effect of sensibly diminishing the supply of water necessary for the navigation at the very time when it was most wanted.

As to the argument from the 4th section of the Act of 1813, and the 23rd section of the Act of 1821, I am clearly of opinion that these sections do not apply to the supply of water to the summit level of the original canal.

The following Order was entered upon the Journals:—

Ordered, That the order of the Lords Justices of the Court of Appeal in Chancery, of the 10th of March, 1874, be varied as follows; namely, "It is Declared that the Plaintiffs (Respondents), as the owners of the tenement called *Wayte's Mill*, are entitled to the *Wroughton Stream*, and to the waters flowing in a defined and natural channel into and forming part of the same, as such stream and waters have been accustomed (before the interference therewith in the bill complained of) to flow down to the said tenement, subject to the ordinary and reasonable use of the said stream and waters by the riparian owners higher up upon the said stream; and it is Declared that the diversion by the Defendants (Appellants) of the said stream and waters into their reservoir near *Wroughton* village for the purpose of supplying water to the town of *Swindon* is not within such ordinary or reasonable use: And it is also Declared, That the Plaintiffs (Respondents), under and by virtue of the powers contained in the Acts of Parliament in the pleadings mentioned, are entitled to use the said stream and waters as the same have been accustomed (before such interference as aforesaid) to flow down to and into their canal, so

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far as the said stream and waters are required for the supply and navigation of their canal, and subject to such ordinary and reasonable use by upper riparian owners as hereinbefore mentioned: And it is Ordered, That an injunction be awarded to restrain the Defendants (Appellants) from diverting into their said reservoir or otherwise the said stream and waters so as to interfere with the supply of water required for the navigation of the said canal": And That the said order of the Lords Justices, subject to the above-mentioned variation, be and the same is hereby affirmed: And it is further Ordered, That the said Appellants do pay or cause to be paid to the said Respondents the costs incurred by them in respect of the said appeal, the amount thereof to be certified by the Clerk of the Parliaments: And it is also further Ordered, That the cause be and the same is hereby remitted back to the Court of Chancery, to do therein as shall be just and consistent with this variation and judgment.

Lords' Journals, 15th June, 1875.

Solicitor for the Appellant: *James Crowdy.*
Solicitors for the Respondents: *Thomas White & Sons.*

FREDERICK F. J. MORRICE . . . . . APPELLANT; 1875 June 23.

AND

GEORGE E. AYLMER . . . . . RESPONDENT.

Will—Railway "Shares"—Railway "Stock."

The words "shares in a railway" company used in a will, are sufficient to pass "stock" in a railway company.

A testator bequeathed to his wife (besides other property) "leasehold estates and all such stocks in the public funds, or shares in any railway of which I may die possessed," and moneys and securities, for her life, then to his children if he should have any, and on her death and failure of issue he gave "the same leasehold estates, stocks, shares, moneys, and securities" unto his brother *T. B. A.* absolutely. The residue, consisting of carriages, furniture, moneys at his bankers, and rents then due to him, he gave to his wife absolutely, and made her his executrix; he died possessed of stock in the funds, of stock in a railway, and of shares in the same railway not fully paid up, and not converted into stock:—

Held, that the words "shares in any railway" passed the testator's stock in that railway.

Oakes v. *Oakes* (1) overruled.

Trinder v. *Trinder* (2) and *In re Gibson* (3) explained and applied.

GEORGE WILLIAM AYLMER, of *Upper Grosvenor Street*, made his will, dated the 14th of July, 1853, which contained the following, among other bequests:—"I give all such stocks in the public funds, or shares in any railway, of which I may die possessed, and that may be standing in my own name, and also all such moneys as I may have out on mortgage, or any other security," &c., unto my wife for her life, and after to any child, &c., "and after the decease of my wife and failure of issue, I give the same stocks, shares, moneys, securities, and other property unto my brother *Thomas Brabazon Aylmer* absolutely . . . I give all the stock now in the New £3 5*s.* per cent. Annuities, unto my said wife for her own use and benefit absolutely." He gave the residue, consisting of carriages, horses, furniture, plate, &c., and moneys at his bankers, and rents then due to him, to his wife absolutely, and appointed her his executrix.

(1) 9 Hare, 666. (2) Law Rep. 1 Eq. 695.
(3) Law Rep. 2 Eq. 669.

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The testator died on the 14th of November, 1853. He never had any child. His wife and his brother survived him. When he died he was possessed of £14,000 in the 3¼ per cent. stock, of £6300 stock in the *London and North Western Railway Company*, of sixty-three new shares of £12 10*s.* each in the same company, of which only £2 10*s.* per share had been paid prior to the date of the will, of £5000 *Great Western* railway debentures, and of other personal property not necessary here to be referred to.

The testator's brother, *Thomas Brabazon Aylmer*, died in July, 1858, and was now represented by the Respondent, *George Edward Aylmer*.

Mrs. *Aylmer*, the widow, made her will, dated the 1st of May, 1873, and appointed the Appellant her residuary legatee and executor. She died on the 2nd of February, 1874.

On the 17th of March, 1874, the Appellant filed his bill in Chancery against the present Respondent, praying for a declaration as to the disposition made in the will of the original testator, *George William Aylmer*, as to the £6300 stock in the *London and North Western Railway Company*. The Respondent in his answer claimed that that stock passed by the terms of the will to Mrs. *Aylmer* for her life, and after her death and failure of issue to the testator's brother, *Thomas Brabazon Aylmer*, the Respondent's father.

The cause was heard on the 17th of November, 1874, by the Master of the Rolls, who, considering himself bound by the decision in the case of *Oakes* v. *Oakes* (1), made a decree declaring that according to the true construction of the will the £6300 *stock* in the *London and North Western Railway Company* did not pass to the testator's brother, but formed part of the residue. Mr. *Aylmer* appealed against the decree, which was reversed by the Lord Chancellor *Cairns* and Lord Justice *James*, who (sitting in an Appellate Court) overruled the case of *Oakes* v. *Oakes*, and held that this *stock* did pass (2). This appeal was then brought.

Mr. *Glasse*, Q.C., and Mr. *Fielding Nalder*, for the Appellant :—

The case of *Oakes* v. *Oakes* (1) was a deliberate decision of Vice-

(1) 9 Hare, 666. (2) *Morrice* v. *Aylmer*, Law Rep. 10 Ch. Ap. 148.

Chancellor *Turner*, and is fully justified by the authorities which preceded and followed it, and it cannot be disregarded without introducing great confusion into cases of this sort. There the testator had possessed *shares* in the *Great Western Railway*, and he so described them in his will. They were afterwards by the vote of the company converted (8 & 9 Vict. c. 16, s. 61) into stock. He purchased after the date of his will 8000 4½ per cent. stock of the same company. The two things were different from each other, and were kept distinct in the accounts of the company. As there was in the testator's possession at the date of his will property which would satisfy the description given in his will, the Vice-Chancellor held that that property alone could pass under that description, and that the other did not pass. In *Slingsby* v. *Grainger* (1) the words "in the funds," though following a general description of the testator's property, "my fortune," were held not to pass bank stock. And in *West* v. *Lawday* (2) the same principle of not including, as passing by one description, two things having different designations, was acted upon. Now, here it is plain that shares and stock are two different things, and throughout the will the testator has shewn that he understood the distinction. The whole value of the shares may not be paid up. They cannot then be stock. When shares are fully paid up they may be converted into stock, but the fact that the Legislature thought right expressly to give to companies the power to convert shares into stock, shews that the two things were not only different in name but different in their attributes. *Trinder* v. *Trinder* (3) does not decide this case, for there the testatrix spoke of her shares in the *Great Western Railway* at a time when that was not their proper description, but it became so afterwards, during her life, by the act of the *Great Western Railway Company*, and the bill there set forth facts which shewed that she had always used these words to describe her property, and she had only one kind of railway property. There was therefore nothing in that case that could raise a doubt as to her intention. Here, on the contrary, there were two sorts of property, and the testator used different words to describe them, and one sort, the shares, properly so called, would

(1) 7 H. L. C. 273. (2) 11 H. L. C. 379.
(3) Law Rep. 1 Eq. 695.

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satisfy the words of the will. *In re Gibson* (1) is a decisive authority in favour of the Appellant. There the testator was possessed of £1000 guaranteed stock in the *North British Railway;* his will described "my one thousand *North British Railway* preference shares." After the will he sold his guaranteed stock, and became possessed of stock and shares in the *North British Railway* of a larger amount, and it was held that the bequest being of a specific thing, which had been adeemed, and was not in the testator's possession at the time of his death, a "contrary intention" sufficiently appeared upon the will so as to exclude the operation of the 1 Vict. c. 26, s. 24, and that the railway stock and shares existing at the death were not liable to make good the legacy to the Plaintiff. Here, the railway stock being entirely distinct from the railway shares did not pass under that word, but fell into the residue.

The 8 & 9 Vict. c. 16, shews the difference between shares and stock, first, by allowing (sect. 61) the conversion of one into the other; next (sect. 62), by directing a different treatment of stock from what had been practised as to shares, and allowing the holders of stock "thenceforth" to transfer their interests therein in a different manner. Then too the interpretation clause declares that "shareholder" shall mean shareholder, proprietor, or member of the company, but it takes no notice of stock of the company until the 61st section, where power is given to convert shares into stock, but only such shares "whereof the whole money subscribed has been paid up;" so that the Legislature itself not only took a distinction between shares and stock, but shewed that there might be two sorts of shares, and that only one kind of shares could be lawfully converted into stock. Here some shares had not been fully paid up, and therefore could not in any way be treated as stock, for stock in a railway company resembled stock in the public funds, while shares in the company had no such resemblance. In this will "stocks" had a peculiar meaning—and the word "shares" must receive its strict and proper application.

Mr. *A. E. Miller*, Q.C., and Mr. *W. Barber*, for the Respondent, were not called on.

(1) Law Rep. 2 Eq. 669.

LORD HATHERLEY (1):—

My Lords, the case which your Lordships are called upon to determine on the present appeal is one in which the Lords Justices have come to a conclusion reversing the decision of the Master of the Rolls as to the meaning of the will of a testator, a conclusion which also necessarily overrules a decision come to by Vice-Chancellor *Turner*, the question being simply this, whether or not a will, framed as this will is, describing the subject of the bequest by the testator in these terms, "and also all such stocks in the public funds or shares in any railway of which I may die possessed, and that may be standing in my own name," was sufficient to pass certain stock which at the time of his death he possessed in certain railways.

At the time of the testator making this will he was possessed, it seems, of sixty-three shares in a railway company, of £12 10*s.* each, standing in his own name. Those shares continued to stand in his own name from the time of his making his will up to the time of his death. They had not at the time of his making his will been paid up; only £2 10*s.* had been paid upon them, leaving a sum of £10 due. But it appears that at his death he also was the owner of a sum of £6300 stock in the same railway company. The case mainly turns upon this question, whether or not the expression, "shares in any railway of which I may die possessed and that may be standing in my own name," is sufficient to pass both shares and stock in a railway company standing in his name at the time of his death. It may be observed that in this particular will he refers not only to what he had in hand at the time of his making the will itself, but to all the shares that "he may die possessed of and that may be standing in" his "own name" in any railway company whatsoever at the time of his death. I do not think that anything specially turns upon that circumstance in this particular will, and I think what we now have really to determine is, whether or not stock in a railway company would pass under the word "shares" in a railway company, unaccompanied by any indication in the will to the contrary, that is to say, anything tending to shew that a distinction had

(1) His Lordship had presided at the hearing.

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been intended between the "stock" in a company and the "shares" in a company by the testator himself. The question, I say, is whether this expression, "shares in any railway company," *simpliciter*, is sufficient to pass stock in a railway company. It appears to me, my Lords, to be reduced to that simple point.

Now the course of decision has been this. Vice-Chancellor *Turner* had before him a case (*Oakes* v. *Oakes* (1)) in which a testator had used these words in his will: "I give and bequeath all my *Great Western Railway* shares, and all other the railway shares which I shall be possessed of at the time of my decease" (it resembling remarkably the words of the will in this case) "unto my nephew *Arthur Oakes* for his own absolute use and benefit." At the date of his will he had shares in the *Great Western Railway*, and he afterwards had a considerable sum of stock in that railway company. The Lord Chancellor says in his decision in the present case that he thinks that the argument in that case scarcely dwelt sufficiently upon the character of stock in a railway company, and upon the identity in substance of stock with shares. Possibly it may be that the argument went at some length upon another point, in regard to the view whether or not there had been ademption with regard to the purchase that had been made of that stock; but I find in the argument that it was brought to the attention of the Vice-Chancellor that "there was no alteration in substance in the testator's interest in the property, and that in fact a share in the capital of a railway company and in the stock of the company is the same thing; the only difference that can be suggested between them is, that the interest payable on a share would not be divided." So that, although perhaps it was not sufficiently pressed upon his attention, this point certainly was brought before the learned Judge, and he distinctly decided in that case that *Great Western Railway* stock could not pass under the description of "*Great Western Railway* shares." He did not enter into any very full discussion (not so full a discussion as was his wont) of the reasons which led him to that conclusion; but he considered that there was a marked distinction, as is stated in his judgment, between the railway shares mentioned by the

(1) 9 Hare, 666.

testator in his will and the stock of that same railway company, and he held that the bequest of the "shares" that the testator might have at his decease could not pass stock.

Now, my Lords, on the two cases (1) that were cited by Mr. *Glasse* in his argument on behalf of the Appellant as decisions of my own, the only observation I have to make is this, that in each case what I appear by the report to have said (and my recollection concurs with the report) was applicable to the particular case then before me. In the one case, *In re Gibson* (2), the legacy was adeemed because there was a bequest "to my son of £1000 shares" in a certain railway, which in reality consisted of stock in that railway, and I thought that the bequest was specific—that it pointed to a specific thing—and that thing having afterwards been disposed of by the testator the legacy appeared to me to be adeemed. In saying that it pointed to a specific thing I made use of this observation, "There is nothing else that it can point to." I had in my mind at that time the case of *Oakes* v. *Oakes* (3), having been counsel in that case; and the only reason for making such an observation was in order to shew that the Court was, in the case then before me, placed under no difficulty, because it was absolutely impossible to attribute the bequest there to anything else than a description of the one specific thing which you find the testator to have had which would approximate at all to the terms that he had used in his bequest; and, having only that one thing, the Court was not put to the difficulty of determining whether "stock" could pass as "shares," or whether "shares" could pass as "stock." But in both the cases I came to the conclusion that stock and shares were so similar that, if you did find that the testator possessed any, of either, which would satisfy the description used by him in his bequest, they must necessarily pass. I gave, therefore, no decision upon the particular point that we have now before us, either one way or the other. I said that I was free from the necessity of coming to a decision upon it, owing to the terms which the testator had used in his will in the particular case before me.

(1) *Trinder* v. *Trinder*, Law Rep. 1 Eq. 695; *In re Gibson*, Law Rep. 2 Eq. 669.

(2) Law Rep. 2 Eq. 669.

(3) 9 Hare, 666.

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Now, my Lords, speaking according to my present impression, I do not feel any doubt that if this present testator had been minded to make, as of course he was at liberty to make, a distinction between "shares" and "stock" in railway companies (and I will shew presently how such a distinction might be of importance), he might have so expressed himself in his will as to give all his shares to *A.*, and all his stock to *B.*; and it would then have been understood that he meant to distinguish between those shares and stock (which differ in this respect, that shares are not necessarily paid up), and intended to give to one legatee shares that were perhaps not paid up, and to give to another legatee shares that were paid up, or stock. Shares are not necessarily converted into stock as soon as they are paid up; they may exist either as paid-up or as not paid-up shares. But as regards stock, that can only exist in the paid up state. It cannot (and I follow now the words of the Consolidation Act (1))—it cannot be railway stock until it is consolidated, and shares in a railway company cannot be consolidated until they are paid up.

The Lord Chancellor, in his judgment in this case, states this quite correctly; and no doubt has been thrown upon it in the argument here. In fact, the Lord Chancellor quotes the clause of the statute which provides for this process of changing shares into stock. The heading to the section (the 61st) runs thus: "And with respect to the consolidation of the shares into stock, be it enacted as follows." Therefore the heading itself speaks of "the consolidation of the shares into stock." Then it says:—[His Lordship read the section.]

There is a certain extent of change, as well as consolidation, in these paid-up shares. They are changed from ordinary shares in this respect, that they are no longer incapable of being subdivided. Shares in a company, as shares, cannot be bought in small fractions of any amount, fractions of less than a pound, but the consolidated stock of a company can be bought just in the same way as the stock of the public debt can be bought, split up into as many portions as you like, and subdivided into as small fractions as you please. And that, no doubt, is of great im-

(1) 8 & 9 Vict. c. 16, s. 61.

portance in selling the stock of a railway company. Independently of that, however, it possesses all the qualities of shares. It is, in fact, simply a set of shares put together in a bundle, with this peculiarity added to them, that they are transferable in a manner in which you cannot transfer the ordinary shares of a railway company. That being the case, as they can be thus fractionally dealt with, a provision is added with respect to this process of consolidation of shares, that as regards the power of voting there shall be no voting upon these fractions, but that the voting shall go on in the same way as if the stock only represented a definite number of shares of corresponding amount taken at their nominal value independently of the fraction; that is to say, you may have twenty shares' worth, if I may so express it, of this consolidated stock, *plus* some small fractional amount; in that case you will only vote as a holder of twenty shares. But in all other respects you will be just as you were before the consolidation of your shares.

What, then, is the result of the consolidation of your shares? You obtain a dividend in respect of the whole amount of those shares on the profits of the company; you are entitled to share in those profits. It is not at all analogous, as the learned counsel who spoke last on behalf of the Appellant suggested, to the interest on the public debt which is paid to the holders of the public stocks and funds; but it is an actual partnership. The partnership is complete with all the same accessories, except as to that simple point of voting in respect of a fraction of a share, as those with which the holders of shares remaining still unconverted hold them. There is no difference as between the period of conversion and the period of being fully paid up. It is admitted that there is no distinction to be drawn between what the shares were when they were fully paid up in 1853, and what they were in the year or two which elapsed before they were actually converted into consolidated stock. They were paid up-shares before that conversion, giving all the same rights to holders as paid-up consolidated stock. Then after a time a vote is taken and the shares are consolidated by that vote. But they remain, as it appears to me, to every intent and purpose properly speaking shares, namely, those things which give you a right of partici-

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pating in the profits of that company according to that amount of stock which you hold; in other words, according to the number you hold of shares which have been consolidated.

My Lords, I think there would be extreme difficulty in coming to any other conclusion than that the view taken of this case by the Court of Appeal below is right and should be affirmed. If your Lordships did not so hold, just consider the position in which all testators would be placed who were owners of shares in public companies. They might well bequeath all their shares in public companies which were standing in their name at their death, and it might so happen that those shares being at the time they made their will not paid up, as in the present case, the effect of the bequest might be materially altered in consequence of the process of paying by instalments, as calls were from time to time made upon the shares—the result might be found to be that in four or five companies, in which a man was a large holder of this description of property, shares had been paid up, and afterwards consolidated by a vote of three-fifths of the subscribers voting at a meeting which he (the testator) had not himself cared to attend, and then the consequence would be, that it would be found the whole purport and scope of the will had been altered, perhaps in a few weeks, or months, or even at a time just immediately before his decease. It might be found that a certain quantity of those shares had been turned into stock, and taken out of the operation of his will (whilst the other portion would remain shares) simply from the accident of the time having become ripe for this process of consolidation to take place, as to some shares, though not as to them.

I think, my Lords, it is more consonant with the ordinary language that is used in these transactions, including the language of the Acts of Parliament, where such an expression occurs, to say that "shares" shall be held to include "stock." I think it is perfectly consistent with the language that is used in all Acts of Parliament where shares are dealt with under the head of stock. And it has become, as Lord Justice *James* seems to have thought in the Court below, the ordinary mode in which testators speak of their property, and justly and rightly speak of it. They describes themselves as holding "shares" in a company although

those shares have been converted into stock. And at the same time you comply more strictly with the language of the Legislature when it defines a "shareholder" as a person who is a proprietor in a company, and therefore holds the rights of such a proprietor, and amongst others, the right of participating and sharing in the profits which shall be declared by that company.

For these reasons, my Lords, I think the decision of the Court below is right. In my judgment, the appeal ought in the present case to be dismissed, and the costs will naturally follow the result.

LORD O'HAGAN:—

My Lords, this seems to me a clear case, notwithstanding the decision of a very eminent Judge, which, in accordance with the view of the Lords Justices, I think we are bound to overrule.

Oakes v. *Oakes* (1) is, undoubtedly, an express authority upon the point before us; but I find myself unable to follow it, and I do not share the anticipations of evil from its reversal which have been expressed by the learned counsel at the Bar. Each will has its own peculiarities, and, when it becomes the subject of judicial consideration, must be interpreted according to its own special terms. It is rarely possible to find one so identical with another, as to make the same rulings completely applicable to both; and we unsettle no principle, and induce no inconvenience by differing from the Vice-Chancellor *Turner* as to the particular instruments with which he had to deal.

As to the cases (*In re Gibson* (2) and *Trinder* v. *Trinder* (3)) decided by my noble and learned friend now present here on the woolsack, they do not materially touch the question before us, and so far as they do touch it at all, they appear to me to assist the case of the Respondent. In neither of them was the solution of the present question the basis of the judgment. The learned Judge found a short and simple ground on which to sustain it, in both of them, and he did not wander from his way to settle problems not inviting his attention, or to encounter difficulties which did not press upon him. But he did hold, in both the

(1) 9 Hare, 666. (2) Law Rep. 2 Eq. 669.
(3) Law Rep. 1 Eq. 695.

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cases, that, under certain circumstances, "stock" might properly be taken to describe "shares," and "shares" to describe "stock;" and, so far, he discredited the argument, very forcibly urged upon us, which would attribute to "shares" a meaning so technical and settled as to make it incapable of describing "stock," even though the testator plainly meant, as the Master of the Rolls believed he meant in this case, to use it for that purpose. There are terms to which usage and authority in the law have given so masterful an interpretation, that their rigid construction is not affected by any assurance of the defeat to be necessarily inflicted by it on the real intentions of those who employ them; but "shares" and "stock" are not of this class, and I at least am not desirous to extend the class.

The argument founded on the statutes also appears to me to tell against the Appellant. I asked the learned counsel to indicate the particulars in which any substantial distinction could be demonstrated between "railway shares" and "railway stock;" and there was no satisfactory answer, because the *Companies Clauses Consolidation Act* makes such a distinction impossible. For privilege or for profit, for getting dividends, or giving votes, or acquiring office, they are of equal value and effect. The several holders of stock, says the statute, "shall be entitled to participate in the dividends and profits of the company, according to the amount of their respective interests in such stock; and such interests shall in proportion to the amount thereof confer on the holders thereof respectively the same privileges and advantages for the purpose of voting at meetings of the company, qualification for the office of directors, and for other purposes, as would have been conferred by shares of equal amount in the capital of the company, but so that none of such privileges or advantages, except the participation in the dividends and profits of the company, shall be conferred by any aliquot part of such amount of consolidated stock as would not, if existing in shares, have conferred such privileges or advantages respectively." Manifestly, for every purpose, the "shares" and the "stock" are alike, and when we find the shareholder described in the interpretation clause as a "member or proprietor" of the company, which,

exactly to the same extent and with the same powers and properties, the stockholder also is, and when we farther find the same interpretation clause in various Acts declaring "shares" and "stock" to mean the same thing, we seem to have even the highest legislative authority for the construction which the Appellant somewhat strongly, citing and relying on those very clauses, has asked us to condemn.

The shares, when paid up, grow into stock and are put upon a special register, for the more convenient management of the business of the company; but in substance and in fact they continue the same thing, and may well pass by the same words, unless there be a clear difference made between them, and a plain indication of intention to have them dealt with in different ways. Without this indication, which any one may make if he pleases, they are merely descriptions of identical interests in a company, giving a right to participation in identical advantages, and the use of them by a testator must have identical results. On the whole, my Lords, I have no doubt that the judgment of the Court of Appeal was right, and ought to be affirmed.

LORD SELBORNE:—

My Lords, the word "share," as used in this will, is interpreted by the Master of the Rolls in his judgment as meaning "a share in the capital stock of a railway, which, as we know, may be transferred from one name to another, and may stand in any name." If that is the true interpretation of the word, it is in substance equally applicable to the share in its original state before, and in its later state after, its conversion or consolidation into stock. The share, while still indivisible (whether subject to calls or paid up) and registered upon one plan of book-keeping, is in substance and in truth nothing but "a share in the capital stock of the company," and it is still a "share in the capital stock of the company" after it has become divisible and registered upon a different system of book-keeping. Under both conditions, it is capable of being transferred from one name to another, and it may stand in any name. The difference makes no real change for any purpose whatever material to the nature or the incidents of the property,

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except that the shareholder's power of transfer is no longer subject to certain restrictions. The change, such as it is, may be made by the company without the proprietor's consent. Unless, therefore, the Acts of Parliament have made the word "share" a *vox signata*, in a sense exclusive of stock, stock would be included in its natural and ordinary meaning when there is nothing in the context to lead to a different conclusion. But has the Legislature done this? I think quite the contrary. It has said that "shareholder" is to mean a proprietor or member of the company; it has spoken, not of the conversion only, but of the "conversion or consolidation" of "shares into stock"; and it has used the word "stock" in the sense of the capital stock of the company after it has undergone the process of consolidation, discontinuing the use of the word "shares" only because that word had been used before the process of consolidation for purposes connected with the division of the capital stock into a definite number of shares, and not to express the amount of the interest of any particular individual therein.

I will only add that the whole context of this particular will satisfies me that the testator used the words, "all such shares in any railway of which I may die possessed," in their wider and more natural, and not in their narrower, sense.

Decree complained of, made by the Court of Appeal in Chancery, affirmed, and appeal dismissed with costs.

Lords' Journals, 21st June, 1875.

Solicitors for the Appellant: *Collyer-Bristow, Withers, & Russell.*

Solicitors for Respondent: *Rogers, Jull, & Rogers.*

CHARLES CORSER (ON BEHALF OF THE CREDITORS OF GEORGE JONES) DECEASED . } APPELLANT;

AND

SIDNEY CARTWRIGHT, JOHN JONES, AND OTHERS . . . . . } RESPONDENTS.

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Estate charged with Debts.

An executor, who is also a devisee of an estate charged with the payment of debts, may be presumed by a *bonâ fide* purchaser or mortgagee of that estate, to be dealing with it for the purposes of the administration, and may give a valid title to it. Such purchaser or mortgagee, therefore, will not be bound to look to the application of the money.

Mere absence of statement of the purpose for which the money obtained by the sale or mortgage is to be used, will not make the purchaser or mortgagee liable, on the ground of a presumed knowledge that the money was to be applied otherwise than for the payment of the testator's debts.

In a case, therefore, in which the Lords were satisfied that the mortgagee himself was, as a matter of fact, entirely ignorant of any intended misapplication of the money by the executor and devisee of the estate charged, and that he had not constructive notice of it through his solicitor (who distinctly denied any knowledge or even suspicion of it):—

Held, that though the money was entirely misapplied, the mortgage could not be treated as subject to the debts of the testator, and the mortgagee's title was not, therefore, to be postponed to the claims of the testator's creditors.

On a creditor of the testator, who impeaches the validity of the mortgage or purchase, lies the burden of proving that the mortgagee or purchaser had notice of the true state of the facts.

THIS was an appeal against a decision of the Lords Justices which had reversed a previous decision of the late Master of the Rolls (1).

George Jones, by his will, dated the 13th of November, 1855, first desired that all his just debts and funeral and testamentary expenses should be discharged, as soon as convenient after his decease. He then made provisions as to different properties, real and personal, which he possessed. And as to all the residue of his real and personal estate, including among other hereditaments his estate called *Ruckley Grange* (which he specially named),

(1) Law Rep. 8 Ch. Ap. 971.

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"subject nevertheless and chargeable to and with the payment of all my just debts, funeral and testamentary expenses, and the legacies and sums hereinbefore bequeathed," he gave, devised, and bequeathed the same to his eldest son and heir-at-law, "*John Jones*, his heirs, executors, administrators, and assigns, for their own absolute use and benefit." And he appointed *John Jones* and *Sidney Cartwright* his executors. The testator died on the 7th of March, 1857, and these two persons proved the will. The testator's personal estate was returned as of the amount of £114,000, and his debts at £39,000. The testator's debts were not paid at the period of the following transactions.

On the 8th of March, 1858, *John Jones* mortgaged the *Ruckley Grange* estate to *Thomas Colley* to secure an advance of £11,000 made by *Colley*, and paid over by *John Jones*, not in discharge of his father's debts, but to the *Wolverhampton and Staffordshire Bank*, in part liquidation of his own private liabilities. This mortgage did not set forth the title of *John Jones* as executor as well as devisee, but described him as the person entitled to the estate in fee in possession.

In January, 1867, *John Jones* assigned all his property, real and personal, for the benefit of his creditors, and the deed was registered under the *Bankruptcy Act* of 1861.

Corser was himself a creditor of the testator *George Jones*, and in February, 1866, filed a bill against *John Jones*, the executor, and all other necessary parties, on behalf of himself and the other creditors of the testator for an administration of the testator's estate. The bill charged that the money obtained by the mortgage made to *Colley* was used, and was intended to be used (as *Colley* had notice), by *John Jones* by and for his own purposes. Answers were put in, and *Colley's* knowledge of the real nature of the transaction was most positively denied. Evidence of a very conflicting nature was taken on this point, the alleged notice to *Colley* being, in fact, presumptive notice only, arising from the circumstance that a Mr. *Potts* (formerly solicitor to the testator) was at the time acting as solicitor both for *John Jones* and for *Colley*. Evidence had been taken on this point of alleged presumptive notice, *John Jones* asserting it, while there was an affidavit of Mr. *Potts* distinctly denying that he knew or suspected

the purpose to which *John Jones* intended to apply the advance of the £11,000. The case was heard before Lord *Romilly*, M.R., who being of opinion that the point of notice was sufficiently sustained to render the lender bound by it, made a decree declaring that the mortgage was not an exercise of the power vested in the executors for paying the testator's debts, but was only a mortgage of the beneficial interest of *John Jones*, and must therefore be postponed to the charges of the creditors of the testator. On appeal against this decision the case was argued chiefly on the point whether a *bonâ fide* creditor of a person who was both beneficiary and executor under a will was bound to look to the application of the money for which a testator's estate was sold. The Lords Justices had been of opinion, upon the question of fact, that the evidence entirely failed to make out constructive notice; and on the other point they held that the purchaser or the mortgagee (without notice) of an estate sold or mortgaged by an executor was not bound to institute such an inquiry. This appeal was then brought.

Mr. *Southgate*, Q.C., and Mr. *Bickley Rogers*, for the Appellant:—

Where there is a general devise of property subject to a charge of debts, the first duty of the executors is to satisfy them, and the property cannot be dealt with for any other purpose till they are discharged. The executors are the proper persons to sell or mortgage in order to effect the discharge, and they alone can give a good legal title. That is especially so where the will begins with a general charge of debts affecting all the estates devised, and also where there is a devise of certain estates to particular persons. Though among those certain estates there should be any given to one of the executors, yet the gift to him as devisee does not affect the general liability of all the estates to the control of the executors for the payment of the testator's debts, but that particular estate is subject, like all the rest, to the power of the executors, and the two executors, and not the particular devisee alone (who happens also to be an executor), can give a good title to that estate.

The liability to the payment of debts is a primary liability, and, where the estate is sought to be disposed of for any other purpose,

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the person who becomes the purchaser or mortgagee of it, is bound to shew that he had no knowledge that the money he advanced was to be applied to any other purpose. In this case there could be little doubt that the mortgagee must have known of the intended misapplication of the money. If he was personally unacquainted with the fact, he had as his agent and solicitor a person who had been solicitor of the testator, and must have known the testator's affairs—must have known the existence of large debts as well as of large assets to meet them, and who could hardly have been unacquainted with the fact that those assets had not been employed for that purpose. This gentleman was at that time the solicitor for *John Jones*, the mortgagor, as well as for the mortgagee himself, and must, therefore, have possessed the most ample means to know all the facts of the matter. Through him, consequently, the mortgagee must be affected with knowledge. Such being the case, the mortgagee could only take the estate subject to the debts of the testator, which were the original charge upon it, and the sum secured by this mortgage must therefore be postponed to the payment of the debts due from the testator, which constituted the original charge upon the estate: *Watkins* v. *Cheek* (1), *Horn* v. *Horn* (2), *Howard* v. *Chaffers* (3), *Graves* v. *Graves* (4), *Colyer* v. *Finch* (5), *Price* v. *North* (6), *Jones* v. *Williams* (7), *Shaw* v. *Borrer* (8), *Palmer* v. *Graves* (9), *Eland* v. *Eland* (10), *Forbes* v. *Peacock* (11), *Robinson* v. *Lowater* (12), and *Sugden's* Vendors and Purchasers (13), were cited and commented on.

The *Attorney-General* (Sir *R. Baggallay*), and *F. W. S. Everitt*, for the Respondents, were not called on.

THE LORD CHANCELLOR (Lord *Cairns*):—

My Lords, the testator in this case, *George Jones*, began his will, dated the 13th of November, 1855, by a direction that all

(1) 2 Si. & St. 199.
(2) Ibid. 448.
(3) 2 Dr. & Sm. 236; 32 L. J. (Ch.) 686.
(4) 8 Sim. 43.
(5) 5 H. L. C. 905.
(6) 1 Ph. 85.
(7) 1 Coll. C. C. 156.
(8) 1 Keen, 559.
(9) 1 Keen, 545.
(10) 4 My. & Cr. 420.
(11) 1 Ph. 717.
(12) 5 De G. M. & G. 272.
(13) 13th Ed. p. 544.

his debts and his funeral and testamentary expenses should be paid; and there is no doubt that, unless it is countervailed by something which afterwards appears in the will, a direction of that kind, according to all the authorities, recognised now for a very great length of time in the Court of Chancery, would be equivalent to a charge of all his debts on his estates.

He devised [His Lordship here stated the provisions of the will, see *ante*, p. 731].

My Lords, it appears not to be disputed that *John Jones*, who, indeed, was the person most interested in the estate, was the acting executor in all important acts. He was the person who was the actor, though *Sydney Cartwright*, the co-executor, occasionally joined. The testator, although owing no inconsiderable amount of debts, appears to have been what is deemed a wealthy man. The sworn surplus of his personalty appears to have been over £60,000, and his real estate was of considerable value.

My Lords, the mortgage which has raised the question on the present appeal was made on the 8th of March, 1858, exactly a year after the testator's death, and clearly at a period when no very great progress had been made in winding up the estate or in paying the debts, because we find, even at the present time, many years subsequently, that very large sums indeed are still due to creditors of the testator.

The mortgage in question—the mortgage of which I have spoken of the 8th of March, 1858—was made to the Respondents, and it is a mortgage between *John Jones* of the one part, and *Thomas Colley* of the other part. It recites that "*John Jones* is seised or otherwise well entitled to an estate of inheritance in fee simple in possession, free from incumbrances, of or to the hereditaments hereinafter described and intended to be hereby conveyed or otherwise assured. And whereas the said *John Jones*, having occasion for the sum of £11,000, hath applied to and requested the said *Thomas Colley* to lend and advance him the same at interest upon the security hereinafter contained, which the said *Thomas Colley* hath consented and agreed to do." Then the mortgage is, in an ordinary form, of a portion of the property contained in the devise to *John Jones*. Upon the face of it there is no statement as to any particular mode of application of the

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money. The money was to be paid, upon that security, by the mortgagee into the hands of *John Jones*.

My Lords, with regard to the power of a person situated as *John Jones* was, an executor of the testator, and also entitled as devisee to a large portion of his real estate charged with the payment of debts, there can, I think, be no doubt. I will take the liberty of referring your Lordships to two cases in which the power of persons so circumstanced is clearly laid down. Your Lordships will find that both of these cases liken the position of a devisee, who is also an executor, having real estate charged with the payment of debts, to the position of an executor dealing with personal estate, and say that just as an executor dealing with the personal estate of a testator may sell it or mortgage it for the purpose of raising money, and as in the case of personalty it is to be inferred, unless the contrary is shewn, that he is doing that for the purpose of paying debts, so, with regard to one holding real estate charged with the payment of debts and filling the position of executor, it is also to be inferred, if he raises money by sale or mortgage of that real estate, that he is using the money, as he properly ought to use it, for the same purpose.

My Lords, this was laid down in the well-known case of *Watkins* v. *Cheek* (1) by Sir *John Leach*, who said: "So a mortgagee or purchaser from the executor of a part of the personal property of the testator has a right to infer that the executor is, in the mortgage or sale, acting fairly in the execution of his duty, and is not bound to inquire as to the debts or legacies. But if the nature of the transaction affords intrinsic evidence that the executor, in the mortgage or sale, is not acting in the execution of his duty, but is committing a breach of trust, as where the consideration of the mortgage or sale is a personal debt due from the executor to the mortgagee or purchaser, there such mortgagee or purchaser being a party to the breach of trust, does not hold the property discharged from the trusts, but equally subject to the payment of debts and legacies as it would have been in the hands of the executor. The same principle is applicable to real estate."

And Lord *Cranworth*, in advising your Lordships' House in the case of *Colyer* v. *Finch* (2), which has also been referred to,

(1) 2 Si. & St. 199. (2) 5 H. L. C. 905.

said (1): "It does not matter that the mortgage to *Finch* was not made avowedly"—that is, on the face of it—"for the purpose of raising money to pay debts; that is not at all necessary, unless it was apparent on the face of it that it was not, and could not have been, so intended. I very much incline to think that when a party, the devisee of real estate charged with the payment of debts sells, the purchaser has no need to inquire at all whether the money is applied in payment of debts, or whether it is a sale for the purpose of enabling debts to be paid. The old case of *Elliot* v. *Merriman* (2), which is always referred to, before the Master of the Rolls, makes no such distinction as to whether it was expressed to be made for payment of debts or not. If there be a charge on the devisee in fee, taking an estate charged with the payment of debts alone, or debts and legacies, if he sells, the great convenience of mankind requires that it should be just as if an executor sells when property comes to him, unless it can be shewn that the purchaser knew that the purchase-money was not going to be so employed, and that he was ancillary to something like a fraud. It is to be presumed, because he may presume that the sale has taken place in the ordinary administration of the duties which were imposed upon the executor by the will."

My Lords, for the sake of caution I ought to observe that in *Colyer* v. *Finch* (3), as in the case before your Lordships, the devisee of the real estate charged with the payment of debts was also an executor; and I desire not to apply any observation which I am now addressing to your Lordships to the case of a stranger, that is to say, a person who is not an executor, being devisee of estates charged with the payment of debts. Other considerations may arise there upon which I do not desire at present to offer any opinion. But, taking the case which was contemplated, both by Sir *John Leach* and also by Lord *Cranworth*, of a person who was executor being also devisee of real estate charged with the payment of debts, there the real estate is in his hands, and the money, when the money is produced by the sale or mortgage of the real estate, is in his hands to all intents and purposes, subject to all the powers over it as if it were personal estate to be applied to the

(1) 5 H. L. C. 905, at p. 923. (2) 2 Atk. 43; Barnar. Ch. Cas. 78.
(3) 5 H. L. C. 905.

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payment of debts and legacies; and it is not to be inferred from any absence of a statement of the purpose for which the money is to be used, that it is to be used otherwise than for the payment of debts and legacies.

Now, my Lords, applying that principle to the present case, your Lordships have to consider whether there has been brought before you, in this case, any evidence whatever that this money (the £11,000 raised upon the mortgage of this estate by the executor) was intended to be applied otherwise than for the purpose of the payment of debts. When I say "intended to be applied," I mean, of course, with the knowledge of the mortgagee who was advancing the money. What the person raising the money intended to do with it we cannot know, and it is immaterial for us to inquire into that matter. The question, and the only question, that your Lordships have to consider is, what was within the knowledge, or what was brought to the knowledge of the mortgagee. Now, that this mortgagee himself personally knew anything on the subject of the application or intended application of this money is not even in any way alleged. But it is alleged that notice of an intended misapplication is brought home to him as constructive notice, because it is said Mr. *Potts*, who was solicitor for the mortgagee, was also solicitor for *John Jones*, the devisee and executor, and it is said that Mr. *Potts* as solicitor for *John Jones* knew that *John Jones* intended to use this money for his own purposes, and not for the purposes of the estate.

My Lords, I am bound to say that I have never seen a case which more completely broke down as regards the evidence which would be required to establish a proposition of that kind:—[His Lordship here examined the allegations of the various witnesses, and the letters written during the transaction, and expressed his belief in the denial given by Mr. *Potts*, the solicitor, to ever having had any knowledge of the real purpose for which the money was required.]

The burden of proof being entirely upon the Appellant, every probability of the case going to this, that, as the mortgagee would not willingly lend his money upon a security that would be defective, so his solicitor, having no object and interest in the matter leading him to a different line of conduct, would not allow his

client to advance money upon a bad security, and thereby make himself liable to an action by his client for negligence, and the probability, I say, being entirely against the story of the Appellant, your Lordships have on the one hand the positive statement of Mr. *Potts* in his evidence that he had no notice that there was going to be any misapplication of the money, and you have on the other hand *John Jones* coming forward and, although obviously anxious to do the best he can to upset the security he has executed, yet not condescending upon any distinct contradiction of the statement which Mr. *Potts* has made.

My Lords, under these circumstances, it seems to me that it would be impossible for a moment to hold that the Appellant has discharged the onus which lies upon him of proving that there was any distinct notice given to the mortgagee of the intention of misapplying this money.

Well, my Lords, if that is so, that would dispose altogether of the case except as regards the argument that was raised rather late in the observations of the learned counsel for the Appellant, namely, that there was here some farther infirmity in the title conveyed by this mortgage deed. It was urged by the learned counsel for the Appellant that, there being in the beginning of this will a direction that the debts should be paid, that must be taken to be a charge of the debts upon all the estates of the testator, and that, inasmuch as there are specific devises of certain parts of his estates, before you come to the devises to *John Jones*, there must be implied a power in the two executors to sell for the payment of debts those estates, other than those devised to *John Jones*, and if there is a power to sell those estates, it must be in the two executors that the power is to be found to sell any of the estates devised by the will for the payment of debts; and that therefore, as the learned counsel contends, there can be no power in *John Jones* alone to sell the estates devised to him for the payment of debts; and therefore for the want of concurrence of Mr. *Cartwright* there is no title given by the mortgage deed such as would arise upon a sale made for the purpose of paying debts.

It appears to me that for the purpose of the decision of this case that argument is entirely fallacious. I do not think that it is at all necessary to express any opinion as to whether there was

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or was not a charge of debts upon those estates which were devised, apparently in strict settlement; or, if there was a charge of debts upon those estates, who is the person, or who are the persons, who could have sold those estates for the payment of debts. But what I find is this, that the estates with which your Lordships have to deal are clearly devised to, and the legal estate vested in, the residuary devisee, who was also one of the executors. I find him selling or mortgaging, and I find him, beyond all doubt, able to sell and able to give to a mortgagee a good title to the legal estate. I find that that legal estate is in his hands, and therefore any money that is produced by the sale or mortgage of that legal estate, is subject to and chargeable with the payment of debts and legacies; and that therefore the money coming into his hands must be money which ought to be applied to the payment of debts and legacies. But then I find that he himself is an executor of the testator; that he himself is the person who ought to hold assets impressed with the liability to satisfy debts and legacies. I find, therefore, that assets which ought to be applied to the payment of debts have come into the hands of an executor, and that he has given a receipt for them. Therefore, on the one hand, the mortgagees have got the legal estate; and, on the other hand, they have got a receipt from the proper person for money which ought to be applied to the payment of debts and legacies. That being so, it appears to me that their title is entire and complete, without entering into any farther consideration of the question what might have been the case of a sale being attempted of other parts of the estate not comprised in the residuary devise.

My Lords, under these circumstances it appears to me that the decision of the Lords Justices was entirely correct; and I therefore move your Lordships that the appeal be dismissed with costs.

LORD HATHERLEY:—

My Lords, I am entirely of the same opinion. With regard to the point of law, it appears to me, whatever may be the consequences (upon which I carefully avoid expressing any opinion) of the series of limitations in strict settlement contained in this will with reference to the charging of debts upon the estates, and the power to the executor in the first instance to sell those estates,

it is perfectly clear that we have, as regards *John Jones*'s estate, this devise to one who, as has been already stated, is an executor, to one who is able to give a receipt for the purchase-money in that capacity, to one who had in him the whole legal estate, and was capable of conveying it, and who, when once so conveyed, was able to receive the money, his being the proper hand to receive it, supposing all to have been fairly conducted. I apprehend that your Lordships will not give such an effect as has been suggested to the implied power in executors by extending the principle of *Robinson* v. *Lowater* (1) to a different state of circumstances. Whatever may be the principle on which *Robinson* v. *Lowater* (1) was decided, it was certainly not intended by that decision in any way to establish that a person having a devise expressly charged with the payment of debts, and being himself (as happened in this case, and that strengthens it materially) one of the executors, was to have that estate and interest overridden by an implied power in both the executors, enabling them, by the concurrence of their authority, to override anything that was done by a devisee, (he being also one of the executors,) and to displace an estate which was in him, which he had absolute power to convey, and which he had conveyed. I think clearly in this case, which is very much like that of *Colyer* v. *Finch* (2) throughout, the interest clearly passed, and the sum of money came into the proper hands.

The only doubt, my Lords, which could have arisen upon the case, was upon a question of fact, such as that which was pointed out in the case before Sir *John Leach* (3), which was cited in the argument. If a person who was about to buy an estate charged with the payment of debts and of legacies, could be proved to be perfectly aware that the purchase-money was to be applied only for the seller's own use, and not for any purpose whatever connected with the debts and legacies; for instance, if it was to be taken in satisfaction of a previous debt due from the executor himself (the person selling) to the purchaser, that would be a case which would occasion the estate to be followed and to be deemed to be held upon the same trusts as the moneys were held upon, and for the same purposes to which they ought to be applied.

(1) 5 De G. M. & G. 272. (2) 5 H. L. C. 905.

(3) *Watkins* v. *Cheek*, 2 Si. & St. 199.

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CARTWRIGHT.

But there is nothing of that kind for a moment to be suggested here, as it seems to me, upon the evidence before us. If anything would make one hesitate upon the subject for a moment (if one did hesitate, though I can scarcely bring my mind to do so) it would be the previous decision of the Master of the Rolls. But it appears to me that his Honour laid stress upon certain portions of the evidence, which the evidence would in no way bear. There is a clear and precise denial by Mr. *Potts* of any such knowledge as to the application of the money. The knowledge to be brought home to Mr. *Potts*, as the solicitor for the mortgagee, could only therefore be established by some irrefragable proof:—[His Lordship here went through the evidence which satisfied his mind that Mr. *Potts* had never any knowledge of the purpose for which the money was really raised.]

My Lords, I cannot find in any part of these transactions anything whatever to justify us in saying that we shall disbelieve Mr. *Potts* and give credit to Mr. *Jones*. And if not, such evidence as would be necessary to establish a trust as against the purchaser is wanting. No such trust ever came clearly within the purchaser's own knowledge (it has never been pretended that it did), and no such trust has been established as ever having come within the knowledge of his solicitor, Mr. *Potts*.

LORD O'HAGAN:—

I have no doubt that the Lords Justices were right in the conclusion at which they arrived.

For the reasons given by the Lord Chancellor, which I see uo advantage in repeating, I think your Lordships ought to hold the mortgage to have been effectually executed. The implication possibly arising on the direction for payment of debts, in the opening of the will, which might give the executors alone a power of sale, is encountered and overborne by the specific devise in subsequent clauses, and the devisee, who is also the executor, was legally qualified to make a valid conveyance and give a valid acquittance for the price.

If he was, the only question remaining is one merely of fact; and, dealing with it as a jury should be advised to deal with it, I find the oath of Mr. *Jones* directly and irreconcilably contra-

dicted by that of Mr. *Potts*. I shall not, with the Lords Justices, for I do not think it essential to the case, consider the comparative personal credibility of those gentlemen. I should be unwilling to impute to either a wilful indifference to the truth; but there seems to me, for reasons I indicated in the course of the argument, a preponderating probability in the testimony of Mr. *Potts*, which casts on the Appellant, with whom is the onus of establishing the fact of notice, the necessity of producing very strong evidence indeed to incline the balance in favour of Mr. *Jones*. In my opinion he has wholly failed to furnish such evidence. The documents on which he relies do not appear to me to aid *Jones'* testimony, if they do not rather tend to confirm the testimony on the other side: we have therefore nothing but oath against oath, with high probability on the one side and utter improbability on the other. In that state of circumstances your Lordships will be slow to hold that there is satisfactory proof of the alleged notice, and, failing such proof, the Appellant cannot prevail, and the judgment of the Lords Justices must be affirmed.

LORD SELBORNE:—

My Lords, I entirely agree. It would, in my opinion, be most dangerous to throw the slightest doubt upon the power of a devisee and executor, such as *John Jones* was, under his father's will, to make a good title to a mortgage as against the creditors of the testator, by such a deed as that of the 8th of March, 1858. In so saying, I assume, of course, that the mortgagee has no notice of any fraud, or breach of duty, on the part of the devisee and executor in the transaction. Such notice, if alleged, ought to be clearly proved. In this case I think there is no evidence whatever of notice except the statements of *John Jones*, contradicted in all material points by Mr. *Potts*, whose testimony I believe.

Decree appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 22nd June, 1875.

Solicitors for the Appellant: *Miller & Smith.*
Solicitor for the Respondent: *W. Lane.*

1875
June 28.

WILLIAM GREGORY DAWKINS . . . . { PLAINTIFF IN ERROR;
AND
THE RIGHT HON. HENRY LORD ROKEBY { DEFENDANT IN ERROR.

Military Court of Inquiry—Defamatory Statements by a Witness——Action in respect of.

1QBD.499.
500,-2,
4CPD.541-6
2CPD.54-6
58,-9 60,
6QBD307,-8
11QBD591-4
597,

No action will lie against a witness for what he says or writes when giving evidence before a Court of Justice. The rule is founded on principles of public policy. The same principle applies where a military man is bound to appear and give evidence before a military Court of Inquiry.

Where, therefore, a general in the army was called before a Court of Inquiry, assembled under the order of the General Commanding-in-Chief, to inquire into the conduct of a particular officer, made statements in evidence, and, after the close of his evidence, handed in a written paper (not called for by the Court, but having reference to the subject of the inquiry) as to the conduct of that officer, and an action was brought in respect of those statements, which were alleged to be untrue and to be malicious:—

Held, that evidence of their falsehood and malice was immaterial and irrelevant, and that being statements made by a military man in the course of a military inquiry, in relation to the conduct of a military officer, and with reference to the subject of that inquiry, they were privileged.

A military Court of Inquiry may not be strictly a judicial tribunal, but where such Court has been assembled under the orders of the General Commanding-in-Chief in conformity with the Queen's Regulations for the government of the army, a witness who gives evidence thereat stands in the same situation as a witness giving evidence before a judicial tribunal.

THE Plaintiff in this case was a lieutenant-colonel in the army, and held a commission in the Coldstream Guards, the Defendant was a lieutenant-general in the army, and commanded a brigade of which the Coldstream Guards formed part. On the 3rd of February, 1865, His Royal Highness the Duke of *Cambridge*, then the General Commanding-in-Chief, directed that a Court of Inquiry should be held to inquire into certain matters set forth in a letter written under his Royal Highness's authority by Sir *James Yorke Scarlett*, holding the office of Adjutant-General of the Forces. The letter was addressed to Major-General Lord *Frederick Paulet*, C.B., and directed him to "cause Colonel *De Bathe*, C.B. (Scots Fusilier Guards), Colonel H.S.H. Prince *Edward of Saxe*

Weimar, C.B. (Grenadier Guards), Colonel *Stephenson*, C.B. (Scots Fusilier Guards), and Colonel *Wynyard* (Grenadier Guards), to be detailed as members of a Court of Inquiry to be assembled under the presidency of General Sir *Alexander Woodford*, G.C.B." On the 4th of February Sir *James Yorke Scarlett*, under the same authority, wrote to General *Woodford* informing him that he had been constituted the president of the Court. The object of its assembling was thus stated, in accordance with the requirements of the Queen's Regulations (1): "The subject which will be submitted for your investigation arises out of an assertion, frequently repeated and insisted on, by Lieutenant-Colonel *Dawkins*, that certain officers under whose command he has at various times been placed have made false statements of facts to his injury. Repudiating the interpretation which His Royal Highness was willing to place on these words, viz., 'That Lieutenant-Colonel *Dawkins* alluded to opinions and conclusions on the part of those officers with which, being unfavourable to himself, he did not coincide,' this officer has insisted on giving the more offensive interpretation to his words." The letter then went on to say that in justice to the officers who, "in the exercise of their command," had found fault with Lieutenant-Colonel *Dawkins*, it was necessary to ascertain whether he could substantiate his charges against them. The Court was therefore directed to give its "opinion as to the validity of the charges in the sense in which Lieutenant-Colonel *Dawkins* presses them against his superior officers, and also its opinion upon Lieutenant-Colonel *Dawkins*' conduct generally, as evinced by the correspondence submitted, and to state how far the service will be benefited, or the contrary, by placing Lieutenant-Colonel *Dawkins* in command of a battalion of guards when the occasion presents itself."

The Court of Inquiry met on the 10th of February and held several sittings, of which the last was on the 29th of March.

On the 14th of February (as alleged in the bill of exceptions) "The Defendant then being and having been such officer as aforesaid was required to, and did appear before the said Court of Inquiry to be examined before the said Court touching the matters

(1) See the parts of the Regulations material to this case in the report, *Dawkins* v. *Lord Rokeby*, Law Rep. 8 Q. B. at p. 257.

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so referred and submitted to the said Court as aforesaid, and was examined by the said Plaintiff and by the said Court respectively touching the matters so referred and submitted as aforesaid." The Defendant made certain statements, the making of which was thus set forth in the Bill of Exceptions.

"And afterwards, and after the close of his examination before the Court, and without any request by the Court, or by the Plaintiff, or by any person, to him so to do, handed in to the said Court a written paper, containing the words complained of.

The Plaintiff applied for a Court Martial on the Defendant for his conduct towards the Plaintiff in making these representations; but the Court Martial was refused, and the Plaintiff then brought an action for libel in the Court of Queen's Bench to recover damages for the alleged defamation. The Defendant pleaded not guilty. The cause was tried before Mr. Justice *Blackburn*, when, on the part of the Plaintiff, evidence was offered, in support of the allegations in the declaration, that the statements verbal and written were made *malâ fide* and with actual malice, and without any reasonable or probable cause, and with a knowledge on the part of the Defendant that they were respectively false. It was objected on the part of the Defendant that even if such evidence could be received, and had been given, the action would not under the circumstances which existed here be maintainable. Mr. Justice *Blackburn* held that the evidence tendered was immaterial and irrelevant, and that, as a matter of law, the action would not lie if the verbal and written statements were made by the Defendant, being a military man, in the course of a military inquiry, in reference to the conduct of the Plaintiff being a military man and with reference to the subject of that inquiry, even though the Defendant should prove that the Plaintiff had acted *malâ fide* and with actual malice, and without any reasonable or probable cause, and with a knowledge that the statements so made and handed in by him were false; and His Lordship so directed the jury, and under his direction a verdict was found for the Defendant.

A bill of exceptions having been tendered, the case was heard in the Exchequer Chamber, where judgment was delivered on the

1st of February, 1873, by Lord Chief Baron *Kelly*, in the name of himself and the other Judges, and the judgment of the Court below was affirmed (1). This proceeding in Error was then brought.

The Judges were summoned, and Lord Chief Baron *Kelly*, Mr. Justice *Mellor*, Mr. Justice *Brett*, Mr. Justice *Grove*, and Mr. Baron *Pollock*, attended.

Mr. *H. Matthews*, Q.C., and Mr. *Holl*, for the Appellant:—

It is admitted that what is said by a Judge or a counsel in the discharge of duty in a judicial proceeding cannot be made the subject of an action for defamation. It is privileged: *Floyd* v. *Barker* (2); *Damport* v. *Sympson* (3); *Jekyll* v. *Moore* (4); *Scott* v. *Stansfield* (5); *Hodgson* v. *Scarlett* (6). But those decisions do not establish the doctrine contended for in this case. Here the Court of Exchequer Chamber strained the principle of protection much too far by extending it not merely to military tribunals, properly so called, but to meetings of military men in what were really investigating committees, having nothing whatever of a judicial character about them. The Court below seemed to fancy that where there was even the pretence of the exercise of military authority the man injured by a false and malicious slander had no right to civil redress against the man who had injured him. The cases of *Grant* v. *Shard* (7), *Frye* v. *Ogle* (8), *Moore* v. *Bastard* (9), and *Reynolds* v. *Kennedy* (10) (the last a case under the revenue laws) shew that where a jurisdiction exists, even if the exercise of that jurisdiction is in the particular case unwarranted, no action for the exercise of it or putting it in motion will lie. In all these cases the act done was of a judicial kind, and the jurisdiction was a known and established jurisdiction. In neither respect can that be said here: *Simmonds* on Courts Martial (11). A Court of mili-

(1) Law Rep. 8 Q. B. 255.
(2) 12 Co. Rep. 23.
(3) Cro. Eliz. 520.
(4) 2 N. R. 341.
(5) Law Rep. 3 Ex. 220.
(6) 1 B. & Ald. 232.
(7) Cited (in *Warden* v. *Bailey*) 4 Taunt. 85.
(8) Cited (in *Warden* v. *Bailey*) 4 Taunt. 87.
(9) Ibid. 70.
(10) 1 Wils. 232.
(11) Ch. ix. See also Prendergast on "The Law relating to Officers of the Army."

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tary inquiry is not in any respect a judicial Court (1). Not one of the requisites of a Court belongs to it. It is not a Court established by law, nor recognised in the Mutiny Acts; the persons who are to make the inquiry have no judicial character or office; they have no settled legal jurisdiction; they are only persons nominated for the time being, who may never before have exercised any judicial functions, who may never again be called on to do so, and who really have not any judicial functions to exercise, for they decide nothing, and can only report their opinion to the authority which calls them together, and which may altogether disregard their finding and contradict their recommendations. They have no established forms of procedure; they cannot administer an oath; they cannot compel the attendance of any but military men, and that only in virtue of military obedience to the Commander-in-Chief; they cannot give a judgment and enter it upon record; and, in fact, they are a mere assembly of officers without a recognised legal status and without inherent authority. It is impossible that the law can concede to such a body of persons the privileges which are rightly accorded to Courts of Justice. To give to statements made before such a body the value and the protection afforded to evidence given on oath before the legal tribunals of the country, where the witness is compellable to attend and compellable to give evidence on oath, and is liable to indictment for perjury if that evidence is false, is certainly something which the principles of law will not warrant. The objection to affording the protection becomes of course all the stronger when it appears that the statement made was not in answer to questions which must be answered by a witness who was compellable to give evidence, but was a statement voluntarily offered to an anomalous tribunal, made in writing before the witness was examined, not made the subject of examination and cross-examination, but obtruded at the last moment on the notice of the assembled officers.

In two cases, *Dickson* v. *Wilton* (2) and *Dickson* v. *Combermere* (3), the first of which was tried before Lord *Campbell*, that learned judge deliberately treated the question of malice with regard to

(1) The Queen's Regulations, quoted Law Rep. 8 Q. B. 257: "A court of inquiry is not to be considered in any light as a judicial body."

(2) 1 F. & F. 419.

(3) 3 F. & F. 527.

the making of such statements before what was called a "Court of Inquiry" as one which was to be submitted to the decision of a jury. And in the second of these cases Lord Chief Justice *Cockburn* treated the *bona fides* of the statements made as a matter for consideration by a jury. In *Beatson* v. *Skene* (1), which was a case much resembling the present, it was held that it was properly left to the jury to say whether the statement complained of was properly made as relevant to the inquiry which had been ordered. And in *Dawkins* v. *Lord Paulet* (2) Lord Chief Justice *Cockburn* had declared his dissent, on principle, from the supposed doctrine that libellous statements could be made on such occasions with perfect impunity for those who made them. In *Keighly* v. *Bell* (3), tried before Mr. Justice *Willes*, the Defendant escaped the consequences of liability only on the ground that no evidence was there given of malice on the part of the author of those statements which were then the subject of investigation. Here, where evidence was tendered to shew the falsehood and malice of the statements, that evidence was rejected, and it was broadly laid down that such evidence was immaterial and irrelevant; and that, though the statements were proved to be both false and malicious, no action would lie in respect of them.

The great authority for the present decision seems to have been that of *Sutton* v. *Johnstone* (4), where a captain in the navy having been tried by court martial at the instance of his commander for a breach of duty, and having been honourably acquitted, brought an action against that commander; and it was held that the action would not lie. But that case has received an application which the Judges who decided it never intended. There a regular charge was made, and was heard before a regularly constituted tribunal. It was not so here. That case shews that the real *ratio decidendi* was not the want of legal power to sustain such an action where there was no probable cause for the prosecution, but the belief that there had been probable cause for it, and that there was no want of jurisdiction in the tribunal which entertained it. In the case of *Wall* v. *McNamara*, which was there cited (5), the charge

(1) 5 H. & N. 838. 6 Jur. N. S. 780
(2) Law Rep. 5 Q. B. 108.
(3) 4 F. & F. 763.
(4) 1 T. R. 493.
(5) 1 T. R. 536.

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of Lord *Mansfield* to the jury is quoted, and there that learned Judge distinguished between the enforcement of military obedience and the malicious and cruel use of military power under the pretence of enforcing it. In the latter case he had no doubt that civil responsibility was incurred; and a verdict for considerable damages was taken. The rule there acted on was strictly applicable here. In the present instance, the opinion seemed to prevail that, though a wrong had been committed, the civil Courts would not take cognisance of it, because that wrong was committed by one military man on another military man, in the course of some proceeding before a body of military men who met to inquire into the conduct of one of the parties. There could be no justification in principle for such an opinion. And it should be remembered, too, that that wrong was committed voluntarily, and not upon any compulsion of law, or even of military discipline, or military custom, for though it might be said that the Defendant, being a military officer, was bound, on the requisition of his superior in command, to state what he knew as to the questions asked him, there could be no pretence for saying that he was entitled to volunteer charges of a serious nature against any one, and yet be entitled to shelter himself under the plea that he had come to the inquiry in obedience to military orders. The particular slander of which the Plaintiff complained was made without any such reason—it consisted of a written statement previously prepared, and handed in without being asked for.

In *Warden* v. *Bailey* (1) an inferior officer was declared capable of maintaining an action against his superior officer (both being at the time under martial law) for having imprisoned him for disobedience to an order which the colonel, who commanded them both, had no legal or military power to make. And though that judgment was afterwards, on a bill of exceptions to the evidence and ruling, set aside (2), it was so not because of what the Court below had done, as done erroneously, but on grounds entirely independent of the first decision, namely, first, that there was a statutable bar to the action in regard to the time of bringing it; and, next, that the evidence shewed that, in addition to the mere

(1) 4 Taunt. 67. (2) 4 Mau. & Sel. 400.

disobedience of an order, there had been mutinous expressions used by the Plaintiff, which entirely warranted the Defendant in what he had done.

Then came the case of *Keighly* v. *Bell* (1), where Mr. Justice *Willes* held that the action would not lie; but that was because the learned Judge was satisfied on the evidence that there had not been any proof of malice. That decision itself shewed that if there had been proof of malice the action must have succeeded. *Revis* v. *Smith* (2) simply decided that a man was not liable to an action for a statement made by him *vivâ voce* or by affidavit in the course of a judicial proceeding; and that case really, therefore, carried the doctrine of indemnity no farther than in any of the cases already commented on. Here there was no judicial proceeding, and the defamatory statements were not made in virtue of any judicial compulsion; and there, too, no averment was made of malice. Such averment was on the record here. The case of *Home* v. *Bentinck* (3) did not lay down the doctrine now contended for. All that that case decided was that the report of a Court of Inquiry made in the due discharge of its functions, not the voluntary statement of a person officiously presented to it, was privileged as a state paper, and its production in evidence could not be enforced. In *Dawkins* v. *Lord Paulet* (4), though on the whole the result was treated as deciding that an action of this kind would not lie (a decision from which Lord Chief Justice *Cockburn* expressly dissented), Mr. Justice *Mellor* relied much, as the ground of his judgment (5), on what he deemed the effect of the replication and the demurrer, for he thought that the replication admitted as a fact that the letters there complained of had been written in discharge of military duty. But that could not be said here, for this Defendant had not been asked to write the paper, nor to put it in evidence, but had at the conclusion of his evidence voluntarily tendered it to the Court, by which it had been received. So that, even if writing a paper called for by such an assembly of officers could be treated as an act of obedience to a Court, and therefore protected, no such pro-

(1) 4 F. & F. 763.
(2) 18 C. B. 126; 25 L. J. (C.P.) 195.
(3) 2 B. & B. 130.
(4) Law Rep. 5 Q. B. 108.
(5) Ibid. at p. 113.

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tection existed in this case, for it had not been called for. But it is contended that even if it had any protection thereby attaching to it, the title to protection ceased if it could be shewn to be both false and malicious. The Plaintiff proposed to shew that it was so, and the refusal to admit evidence to that effect, and the declaration that such evidence even if given would be irrelevant and immaterial, were contrary to the principles of English law, and the direction given thereon could not be sustained.

The case of *Henderson* v. *Broomhead* (1) was the first case in which the doctrine now contended for was distinctly put forward, but there every part of the proceeding was before a Court of competent jurisdiction, which was not the case here; and that case is really no authority for the ruling in the present.

Mr. *Bulwer*, Q.C., Mr. *C. Bowen*, and Mr. *Fitzmaurice*, for the Respondent, were stopped.

THE LORD CHANCELLOR proposed the following question to the Judges:—

Whether the opinion and ruling of the learned Judge in this case, as stated in the bill of exceptions, and his direction thereupon to the jury, were right in point of law?

The Judges retired to consider their answer. On their return

THE LORD CHIEF BARON (Sir *F. Kelly*), in the name of the consulted Judges, gave the following answer to the question proposed:—

My Lords, these of Her Majesty's Judges who have had the honour of attending your Lordships during the argument of this case, are unanimously of opinion that the question put to them by your Lordships must be answered in the affirmative.

A long series of decisions has settled that no action will lie against a witness for what he says or writes in giving evidence before a Court of Justice. This does not proceed on the ground that the occasion rebuts the *primâ facie* presumption that words disparaging to another are maliciously spoken or written. If this were all, evidence of express malice would remove this

(1) 4 H. & N. 569.

ground. But the principle, we apprehend, is that public policy requires that witnesses should give their testimony free from any fear of being harassed by an action on an allegation, whether true or false, that they acted from malice. The authorities, as regards witnesses in the ordinary Courts of Justice, are numerous and uniform. In the present case, it appears in the bill of exceptions that the words and writing complained of were published by the Defendant, a military man, bound to appear and give testimony before a Court of Inquiry. All that he said and wrote had reference to that inquiry; and we can see no reason why public policy should not equally prevent an action being brought against such a witness as against one giving evidence in an ordinary Court of Justice.

THE LORD CHANCELLOR (Lord *Cairns*):—

My Lords, I am sure your Lordships all feel greatly indebted to the learned Judges for the attention which they have paid to this case, and for the very clear and satisfactory opinion with which they have been able to supply your Lordships upon it.

My Lords, I will ask your Lordships' attention to the particular expression of opinion which was given by the learned Judge who tried the case, upon the correctness of which your Lordships have asked the opinion of the learned Judges who now attend this House. Mr. Justice *Blackburn*, on the occasion of the trial, is stated by the bill of exceptions to have declared his opinion to be, "that the said evidence so offered to be given by the Plaintiff as aforesaid was immaterial and irrelevant, and that, as a matter of law, the action would not lie, if the verbal and written statements were made by the Defendant, being a military man, in the course of a military inquiry in relation to the conduct of the Plaintiff, being a military man, and with reference to the subject of that inquiry, even though the Plaintiff should prove that the Defendant had acted *malâ fide* and with actual malice, and without any reasonable or probable cause, and with a knowledge that the statements so made and handed in by him as aforesaid were false, and then directed the said jury, that under the circumstances so stated and admitted as above set forth, as a matter of law the action would not lie, even though the Plaintiff should prove that

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the Defendant had acted *malâ fide* and with actual malice, and without any reasonable or probable cause, and with a knowledge that the statements so made and handed in by him as aforesaid were false. And the jurors aforesaid, by and under the direction of the said justice, then gave their verdict for the Defendant upon the said issue."

My Lords, I think it is of great importance that your Lordships should bear in mind these precise expressions which I have now read, because I feel sure that your Lordships would not desire your decision upon the present occasion to go farther than the circumstances of this particular case would warrant. The leading facts which are put in prominence by the learned Judge are these: The statements were made by the Defendant, who was a military man, the inquiry was a military inquiry, the statements were made in relation to the conduct of the Plaintiff as a military man, and were made with reference to the subject of that inquiry. I say this more particularly because an argument was addressed to your Lordships to shew that the inquiry in question was not to be considered in the light of a judicial inquiry, and the evidence was not evidence given by a witness on oath. My Lords, that is quite true; but at the same time your Lordships have it in the bill of exceptions that it was an inquiry connected with the discipline of the army; it was an inquiry warranted by the Queen's Regulations and orders for the army: it was called for by the General Commanding-in-Chief, in pursuance of those Regulations; and the Defendant in the action was called upon that inquiry as a witness, as a person who was required to make statements relevant to the inquiry which was then being conducted, and it was in the course of that inquiry that those statements were made.

ICPD.54

Now, my Lords, adopting the expressions of the learned Judges with regard to what I take to be the settled law as to the protection of witnesses in judicial proceedings, I certainly am of opinion that upon all principles, and certainly upon all considerations of convenience and of public policy, the same protection which is extended to a witness in a judicial proceeding who has been examined on oath ought to be extended, and must be extended, to a military man who is called before a Court of

Inquiry of this kind for the purpose of testifying there upon a matter of military discipline connected with the army. It is not denied that the statements which he made, both those which were made *vivâ voce* and those which were made in writing, were relative to that inquiry.

Under those circumstances, my Lords, I submit to your Lordships that the conclusion of the learned Judges is in all respects one which we ought to adopt, and that your Lordships will hold that statements made under these particular circumstances are statements which cannot become the foundation of an action at law. I therefore move your Lordships that the judgment of the Court of Exchequer Chamber be affirmed, and this appeal dismissed with costs.

LORD CHELMSFORD:—

My Lords, I am of the same opinion; and I think it quite unnecessary to add anything to what has been said by my noble and learned friend.

LORD HATHERLEY:—

My Lords, I hold the same view, and do not think it necessary to say anything farther.

LORD PENZANCE:—

My Lords, I also agree in the view which has been stated, but I wish to say one word on the supposed hardship of the law which is brought into question by this appeal.

It is said that a statement of fact of a libellous nature which is palpably untrue—known to be untrue by him who made it, and dictated by malice—ought to be the subject of a civil remedy, though made in the course of a purely military inquiry. This mode of stating the question assumes the untruth and assumes the malice. If by any process of demonstration, free from the defects of human judgment, the untruth and malice could be set above and beyond all question or doubt, there might be ground for contending that the law of the land should give damages to the injured man.

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But this is not the state of things under which this question of law has to be determined. Whether the statements were, in fact, untrue, and whether they were dictated by malice, are, and always will be, open questions, upon which opinions may differ, and which can only be resolved by the exercise of human judgment. And the real question is, whether it is proper on grounds of public policy to remit such questions to the judgment of a jury. The reasons against doing so are simple and obvious. A witness may be utterly free from malice, and may yet in the eyes of a jury be open to that imputation; or, again, the witness may be cleared by the jury of the imputation, and may yet have to encounter the expenses and distress of a harassing litigation. With such possibilities hanging over his head, a witness cannot be expected to speak with that free and open mind which the administration of justice demands.

These considerations have long since led to the legal doctrine that a witness in the Courts of Law is free from any action; and I fail to perceive any reason why the same considerations should not be applied to an inquiry such as the present, and with the same result.

LORD O'HAGAN:—

My Lords, I am quite of the same opinion; and I think that the unanimous judgment of the learned Judges, together with the most satisfactory statement of reasons for that judgment which has been presented to us, dispenses with the necessity of adding any farther observations.

LORD SELBORNE:—

My Lords, I entirely concur.

Judgment of the Court of Exchequer Chamber affirmed, and appeal dismissed with costs.

Lords' Journals, 28th June, 1875.

Attorneys for the Plaintiff in Error: *Guscotte, Wadham, & Daw.*
Attorney for the Defendant in Error: *W. C. Hall.*

FRANCIS HOLLINS AND OTHERS . . . . APPELLANTS;

AND

GEORGE FOWLER AND OTHERS . . . . RESPONDENTS.

1874
June 30;
July 2.
1875
May 7;
July 6.

Trover—Conversion—Broker or Principal.

Any person who, however innocently, obtains possession of the goods of a person who has been fraudulently deprived of them, and disposes of them, whether for his own benefit or that of any other person, is guilty of a conversion.

Where, therefore, *B.* had fraudulently obtained cotton from *F.*, and *H.* (whose ordinary business was that of a cotton broker, and who was utterly ignorant of the fraud of *B.*), purchased it from *B.* in the belief and expectation that *M.*, one of his ordinary clients, would accept it, and *M.* did afterwards accept it, though *H.* only received from *M.* a broker's commission and not a trade profit on the sale:—

Held, that in this instance *H.* had made himself a principal, and by transferring the cotton to *M.* had committed an act of conversion, which made him liable in trover to *F.*, the real owner of the cotton.

A finding of a jury may be explained by the particular facts of the case: thus, a finding that Defendants had bought goods, as agents, in the course of their business as brokers, may be explained by the evidence that they were in business as brokers, and were in the habit of making purchases without any definite instructions from principals, and intended to purchase these goods in that way. But where the facts of the particular case shewed that they had, at the time of the purchase, no instructions from principals to make a purchase, but made it believing that it would be acceptable to persons for whom they often acted as brokers, but who were not bound to adopt the purchase, and who, if there arose any difference as to terms, could not insist on the purchase, the persons thus ordinarily acting as brokers made themselves liable to be treated as principals, and to answer in trover to the real owners of the goods.

Stephens v. *Elwall* (1), and *Hardman* v. *Booth* (2), approved of and acted on.

THIS was an appeal on a Case stated, on which the Court of Queen's Bench had given judgment for *Fowlers*, the Plaintiffs in the action, which judgment had been affirmed in the Exchequer Chamber (3).

Fowler & Co. were merchants at *Liverpool*. *Hollins & Co.* carried on the business of cotton brokers there.

(1) 4 M. & S. 259. (2) 1 H. & C. 803.

(3) Law Rep. 7 Q. B. 616.

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In December, 1869, *Fowler & Co.* instructed their brokers, Messrs. *Rew*, to sell for them thirteen bales of cotton. A person named *Hill*, a clerk to *H. K. Bayley*, a cotton broker at *Liverpool*, proposed a purchase on his master's account. Messrs. *Rew* refused to sell unless the name of a responsible person was given as the purchaser. *Hill* then said that *Bayley* was buying as broker for *Thomas Seddon*, of *Bolton*. The inquiries as to Mr. *Seddon* being quite satisfactory, Messrs. *Rew* forwarded to *Fowlers*, their principals, a sold note, in these terms:—"*Liverpool*, Dec. 18, 1869. Messrs. *Fowler Brothers*. We have this day sold on your account the undermentioned cotton." Then came the description, "Thirteen bales—American—at 12*d.*, per *Minnesota*," and the buyer's name was given thus: "*Thomas Seddon*, per *H. K. Bayley*." The payment was to be "cash within ten days, less 1½ per cent. discount." A counterpart of this note was sent to *Bayley* himself. On the same day *Bayley* sent to Messrs. *Rew* a sampling and delivery order, and the bales were delivered to him, and removed to his warehouse. On the same day, also, Messrs. *Rew* sent to *Bayley* the following note: "Mr. *Thomas Seddon*, per Messrs. *H. K. Bayley & Co.* Bought from *Fowler Brothers*, per *Rew & Freeman*, brokers, 13 bales American cotton, ex *Minnesota*, at 12*d.* per lb., subject to the rules and regulations of the *Liverpool* Cotton Brokers' Association. Payment in cash, within ten days, less 1½ per cent. discount."

On the 23rd of December, *H. K. Bayley*, being thus in possession of the cotton, offered the same to *Francis Hollins* (one of the Defendants), who consented to purchase the thirteen bales at 11½*d.* per pound, and who purchased at the same time twenty-five other bales of cotton from *H. K. Bayley* on the same terms. Messrs. *Hollins*, under the usual form of order, sampled the cotton on the same day. They had on that morning received a message from Messrs. *Micholls*, cotton spinners at *Stockport* (for whom they were in the habit of purchasing cotton), stating that on that day Mr. *Micholls* would be in *Liverpool* to purchase cotton through the Messrs. *Hollins*, and those gentlemen had brought the cotton from *H. K. Bayley* believing it to be of the sort which Messrs. *Micholls* would require. On examining the cotton, Mr. *Micholls* agreed to take it. Messrs. *Hollins* were in the habit of thus buying cotton

in the belief that their customers would take it. If any particular customer did not take to the cotton thus speculatively purchased for him, Messrs. *Hollins* disposed of to some other customer. In the latter part of the 23rd of December, *Bayley* received a delivery order in these terms:—"Please deliver the bearer . . . . cotton, ex *Minnesota*, at 11¾*d.* per lb., bought this day for *Micholls & Co. Francis Hollins & Co.*" The thirteen bales were delivered on the following morning to Messrs. *Hollins*, by whom they were at once forwarded to *Micholls & Co.*, at *Stockport*. *Bayley* received the price of the cotton from *Hollins & Co.*, which was repaid by *Micholls & Co.*, together with a sum for commission and porterage, the Defendants, Messrs. *Hollins*, not obtaining a profit on the cotton, but merely receiving a broker's commission on its purchase.

Messrs. *Fowler* not having received payment for the cotton at the stipulated time (ten days), applied to Mr. *Seddon*, and then learnt that he had never employed *H. K. Bayley* to purchase cotton for him. Application was then made to Messrs. *Hollins* for the bales of cotton, when the answer given was, "the cotton was bought by one of our spinners, Messrs. *Micholls & Co.*, for cash, and has been made into yarn long ago, and as everything is settled up, we regret we cannot render your client any assistance." The action for trover was afterwards brought.

The cause was heard before Mr. Justice *Willes*, at the *Liverpool* Spring Assizes, 1870, when the facts above stated having been proved, the learned Judge left two questions to the jury; first, whether the thirteen bales in question had been bought by the Defendants as agents in the course of their business as brokers; and, secondly, whether they dealt with the goods as agents for their principals. Both questions were answered in the affirmative, and Mr. Justice *Willes* then directed the verdict to be entered for the Defendants, reserving leave to the Plaintiffs to move to enter the verdict for them.

A rule was afterwards obtained for that purpose, and on the 25th of November, 1870, was made absolute. On appeal to the Exchequer Chamber, the Judges were equally divided in opinion, and so the judgment of the Court below stood affirmed.

This appeal was then brought.

The Judges were summoned, and Mr. Justice *Blackburn*, Mr.

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Justice *Mellor*, Mr. Justice *Brett*, Mr. Baron *Cleasby*, Mr. Justice *Grove*, and Mr. Baron *Amphlett*, attended.

The *Solicitor-General* (Sir *John Holker*) and Mr. *Herschell*, Q.C. for the Plaintiffs in Error, Defendants in the action:—

There was nothing here that really constituted a conversion on the part of *Hollins & Co.* The principle that ought to govern a case like the present was fully stated in *Fouldes* v. *Willoughby* (1), and it is this, that a mere wrongful asportation of a chattel does not amount to a conversion, unless the taking or detention of the chattel is with the intent to convert it to the taker's own use or that of some third person. That case was expressly approved by Baron *Martin* in *Burroughes* v. *Bayne* (2). The Defendants were not the purchasers of the cotton—they were mere brokers who purchased for *Micholls & Co.*, whom they charged with broker's commission on the purchase, but not with a profit on the price, and their simple possession of the cotton for the purpose of sending it on to *Micholls*, did not constitute them the owners of it, any more than would the mere possession of it for the purposes of carriage have constituted a railway company the owner. Something beyond that, namely a conversion to their own use, was necessary to render Messrs. *Hollins*, the Defendants, liable in this action. While they were acting in the ordinary discharge of their business as cotton brokers, and were in ignorance of the particular facts of the case—in utter ignorance of the fraud committed by *H. K. Bayley*—they could not be guilty of a conversion. In *Burroughes* v. *Bayne* (3) the acts of the Defendant were held to amount to a conversion, but that was because he knew all the real facts of the case, and with that knowledge still retained the billiard table. Here Messrs. *Hollins* had no knowledge to lead them to the inference, or even to the suspicion, that any fraud had been practised on the owner of the cotton, or that the cotton had not been bought and sold in the ordinary way. The general expression, so often referred to, that any appropriation of a chattel for the use of the Defendants, or of a third party, amounts to a conversion, must be taken with this qualification, that the party

(1) 8 M. & W. 540. (2) 5 H. & N. at p. 303.
(3) 5 H. & N. 296.

appropriating it must do so with a knowledge of the facts which render his act of appropriation unlawful. Without that knowledge there can be no such "intent" as spoken of in *Fouldes* v. *Willoughby* (1). The application of a different rule would render liable all persons who, in the ordinary discharge of their regular business, and without any special knowledge of the facts, dealt with persons who might appear to have a perfect title to property, but whose title was for some cause or other, utterly unsuspected by any one else, defective.

Mr. *Joseph Kay*, Q.C., and Mr. *Bigham* (Mr. *C. Russell*, Q.C., with them), for the Defendants in Error, Plaintiffs in the action :—

In many cases the plea of ignorance of special facts was not admitted as an answer to an action like the present, where those facts could have been known upon ordinary inquiry. But it was not necessary to discuss that question here. The short point was that *Hollins & Co.* had not bought the cotton as agents for any one, but on their own account—they were the real purchasers, and they afterwards sold it to *Micholls & Co.* From the time of *Baldwin* v. *Cole* (2) to the present the rule had been settled that persons so dealing with property would be liable in trover. There Chief Justice *Holt* said: "What is a conversion but the assuming to one's self to dispose of another's property." It is not absolutely necessary that this should be done for the benefit of the person who did it. A servant might render himself liable in trover though what he did was for the benefit of his master: *Perkins* v. *Smith* (3); *Stephens* v. *Elwall* (4). Even sheriffs might render themselves liable in trover: *Garland* v. *Carlisle* (5). But here it is really unnecessary to discuss abstract propositions of law, for it is clear that *Hollins* had bought the cotton on speculation for the benefit of his own firm, and it made no difference that he anticipated he should be able to sell it at once, on the same day, to his ordinary customers *Micholls & Co.*, or that he merely charged a commission on the sale, and did not put a profit on the cotton. *Micholls* could not have compelled him to sell the cotton, and if

(1) 8 M. & W. 540.
(2) 6 Mod. 212.
(3) 1 Wils. 328.
(4) 4 M. & S. 259.
(5) 4 Cl. & F. 693.

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Micholls had not purchased it, *Hollins* could have sold it to any body else. That shewed *Hollins* had assumed the character of purchaser, and was not to be treated as a mere broker. *Hollins & Co.* therefore stood in the situation of actual purchasers of the cotton, and were directly within the operation of the cases which declared such persons liable in trover for unauthorized dealing with the goods of others. *Hardman* v. *Booth* (1) is decisive of the present case. *McCombie* v. *Davies* (2), *Newall* v. *Tomlinson* (3), *Greenway* v. *Fisher* (4), *Cooper* v. *Chitty* (5), and *Lee* v. *Bayes* (6), were also cited and commented on.

The *Solicitor-General* (Sir *John Holker*) replied :—

All the cases shewed that trover had never been held to be maintainable where there was no existing knowledge of the true state of the facts, and no wilful interfering with the property. There was nothing of the kind here. The cotton was really bought for a principal, was really sold to a principal, and nothing more than a mere broker's commission charged upon it.

THE LORD CHANCELLOR proposed the following question to the Judges :—

Whether, under the circumstances stated in the joint case on appeal, the Respondents (the Plaintiffs in the action) were entitled to have a verdict entered for them for the value of the thirteen bales of cotton mentioned in the declaration?

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MR. JUSTICE BLACKBURN :—

My Lords, it appears from the statement in the case that *Fowlers*, the Plaintiffs, had delivered into the actual custody of *Bayley*, a broker, thirteen bales of cotton, their property, they believing that they had sold these bales to *Seddon*, through *Bayley*, as *Seddon's* broker, after they had refused to trust *Bayley* himself; and believing that *Bayley* was the agent of *Seddon* to receive delivery; so that *Fowlers* thought that they were transferring the property to *Seddon*, but were mistaken, as in fact *Bayley*

(1) 1 H. & C. 803.
(2) 6 East, 538.
(3) Law Rep. 6 C. P. 405.
(4) 1 C. & P. 190.
(5) 1 Burr. 20.
(6) 18 C. B. 599; 25 L. J. (C.P.) 249.

had no authority from *Seddon* either to purchase or to take delivery.

Under such circumstances the property and legal right to the possession remained in *Fowlers*, and *Bayley* could not (except by a sale in market overt) confer on any one, however innocent, a title superior to his own. He could not do it under the Factors Acts, because he was not intrusted by the Plaintiffs as their agents; nor could he do it as being a person in whom the property had vested, subject to being divested by the Plaintiffs, for no property, even defeasible, ever passed from the Plaintiffs, as there never was any contract with any one, though they erroneously thought there was one with *Seddon*.

These points were decided, as I think rightly, in the case of *Hardman* v. *Booth* (1).

From the terms of reservation (set out in the note to the report of the present case (2)), it appears that the Defendant had an opportunity to have that case reviewed in a Court of Appeal, if so advised, for it is said that, "The Defendants be at liberty to argue, if necessary, that the sale by *Bayley* under the circumstances gave a good title to a *bonâ fide* purchaser for value without notice." The Court of Queen's Bench, being bound by the decision of a Court of co-ordinate jurisdiction, could not so hold; and the Defendants have not raised the point for a Court of Appeal.

I proceed to state the farther facts.

Hollins, the Defendants, as brokers, acting for Messrs. *Micholls*, and Messrs. *Micholls*, as customers, acting through the Defendants as brokers, dealt with *Bayley* in a manner which would have been quite right, if *Bayley* had been an honest man, or, even a dishonest man, if intrusted by the Plaintiffs with the possession of the goods, as an agent, for sale.

And the Defendants and *Micholls* were both innocent of any knowledge of any infirmity in *Bayley's* title, and not only were they innocent, but I think there is nothing amounting even to evidence of negligence on the part of the Defendants in dealing with *Bayley* without farther inquiry, nor, *à fortiori*, in *Micholls* who trusted the Defendants to act for him, and dealt with *Bayley* because the Defendants selected him.

(1) 1 H. & C. 803.

(2) Law Rep. 7 Q. B. 620.

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Under those circumstances, your Lordships ask the question, whether the Plaintiffs were entitled to have a verdict entered for them for the value of the thirteen bales of cotton.

And I answer that question in the affirmative. However hard it may be on those who deal innocently and in the ordinary course of business with a person in possession of goods, yet, as long as the law, as laid down in *Hardman* v. *Booth* (1) is unimpeached, I think it is clear law, that if there has been what amounts in law to a conversion of the Plaintiffs' goods, by any one, however innocent, that person must pay the value of the goods to the real owners, the Plaintiffs. See *Stephens* v. *Elwall* (2) and *Garland* v. *Carlisle* (3).

And, accordingly, I think it has not been disputed by any one, that if the Plaintiffs had sued *Micholls*, who has worked this cotton up into yarn, *Micholls* must have had judgment against him for the value of the cotton, and would be liable to pay the price over again, though he honestly transmitted the price to the Defendants *Hollins*, who honestly handed it to *Bayley*.

And I take it that if the Defendants have done what amounts in law to a conversion, they also must be liable to pay the Plaintiffs.

It is hard on them, I agree, but I do not think it is harder than it would have been on *Micholls*. Indeed, I think, that if the Plaintiffs were told that they had recourse, at their option, against either the broker or the spinner they might, without any obvious injustice, have said: Then make the broker pay, for he went to *Bayley's*, so that if there is any fault it is his.

But we cannot act on any notions of hardship.

When a loss has happened through the roguery of an insolvent, it must always fall on some innocent party; and that must be a hardship. Had the Legislature thought fit to make a sale in the cotton market at *Liverpool* equivalent to a sale in market overt, the loss would have fallen on the Plaintiffs. As it is it falls on any one who has done what the law esteems a conversion.

We must, I apprehend, in such cases look only to the question, whether on the established principles of law the complaining party

(1) 1 H. & C. 803. (2) 4 M. & S. 259.
(3) 4 Cl. & F. 693.

makes out that the loss should fall on the innocent Defendant rather than on himself, the equally innocent Plaintiff.

If, as is quite possible, the changes in the course of business since the principles of law were established make them cause great hardships or inconvenience, it is the province of the Legislature to alter the law. That has been done to a very considerable extent by the Factors Acts, and it may be expedient to extend that alteration farther, but those Acts have not as yet been extended so far as to embrace the case of any one, whether as broker or otherwise, dealing with a person in the position of *Bayley* in this case. And I apprehend your Lordships will not, in your judicial capacity, depart from the established principles of law to meet the hardship of a particular case, even if you were so convinced of that hardship as to be willing in your legislative capacity to concur in a change of the law in future. But this leaves open what I take it is the real question in this case, viz., whether what the Defendants did amounts on the established principles of law to a conversion.

I own that it is not always easy to say what does not and what does not amount to a conversion. I agree with what is said by my Brother *Brett* in his judgment below, that in all cases where we have to apply legal principles to facts, there are found many cases about which there can be no doubt, some being clear for the Plaintiff and some clear for the Defendant, and that the difficulties arise in doubtful cases on the border line between the two.

I think many cases which at first seem difficult are solved if the nature of the action is remembered.

Lord *Mansfield* says, in *Cooper* v. *Chitty* (1): "The bare defining of this kind of action and the grounds upon which a Plaintiff is entitled to recover in it, will go a great way towards the understanding, and consequently the solution, of the question in this particular case. In form it is a fiction, in substance, a remedy to recover the value of personal chattels wrongfully converted by another to his own use. The form supposes the Defendant may have come lawfully by the possession of the goods. This action lies, and has been brought in many cases where in truth the Defendant has got the possession lawfully. When the Defendant takes them wrongfully, and by trespass, the Plaintiff, if he thinks

(1) 1 Burr. 20; 1 Sm. L. C. 417.

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fit to bring this action, waives the trespass, and admits the possession to have been lawfully gotten."

It is generally laid down that any act which is an interference with the dominion and right of property of the Plaintiff is a conversion, but this requires some qualification.

From the nature of the action, as explained by Lord *Mansfield*, it follows that it must be an interference with the property which would not, as against the true owner, be justified, or at least excused, in one who came lawfully into the possession of the goods.

And in considering whether the act is excused against the true owner it often becomes important to know whether the person, doing what is charged as a conversion, had notice of the Plaintiff's title.

There are some acts which from their nature are necessarily a conversion, whether there was notice of the Plaintiff's title or not. There are others which if done in a *bonâ fide* ignorance of the Plaintiff's title are excused, though if done in disregard of a title of which there was notice they would be a conversion. And this, I think, is borne out by the decided cases. Thus a demand and refusal is always evidence of a conversion. If the refusal is in disregard of the Plaintiff's title, and for the purpose of claiming the goods either for the Defendant or a third person, it is a conversion. If the refusal is by a person who does not know the Plaintiff's title, and having a *bonâ fide* doubt as to the title to the goods, detains them for a reasonable time, for clearing up that doubt, it is not a conversion: see *Isaac* v. *Clarke* (1); *Vaughan* v. *Watt* (2). The principle being, as I apprehend, that the detention, which is an interference with the dominion of the true owner, is, under such circumstances, excused, if not justified.

So the finder of goods is justified in taking steps for their protection and safe custody till he finds the true owner. And therefore it is no conversion if he *bonâ fide* removes them to a place of security. And so far the general statement that an asportation is a conversion must be qualified.

I cannot find it anywhere distinctly laid down, but I submit to your Lordships that on principle, one who deals with goods at the request of the person who has the actual custody of them, in the

(1) 1 Buls. 306, see p. 312. (2) 6 M. & W. 492.

bonâ fide belief that the custodier is the true owner, or has the authority of the true owner, should be excused for what he does if the act is of such a nature as would be excused if done by the authority of the person in possession, if he was a finder of the goods, or intrusted with their custody.

I do not mean to say that this is the extreme limit of the excuse, but it is a principle that will embrace most of the cases which have been suggested as difficulties.

Thus a warehouseman with whom goods have been deposited is guilty of no conversion by keeping them, or restoring them to the person who deposited them with him, though that person turns out to have had no authority from the true owner: see *Heald* v. *Carey* (1); *Alexander* v. *Southey* (2).

And the same principle would apply to the cases alluded to by my Brother *Hannen* in his judgment in the Court below, of persons "acting in a subsidiary character, like that of a person who has the goods of a person employing him to carry them, or a caretaker, such as a wharfinger." It will enable us also to answer a question put during the argument at your Lordships' Bar. It was said: "Suppose that the Defendant had sent the delivery order to *Micholls*, who had handed it to the railway company, requesting them by means of it to procure the goods in *Liverpool* and carry them to *Stockport*, and the railway company had done so, would the railway company have been guilty of a conversion?

I apprehend the company would not, for merely to transfer the custody of goods from a warehouse at *Liverpool* to one at *Stockport*, is *primâ facie* an act justifiable in any one who has the lawful custody of the goods as a finder, or bailee, and the railway company, in the case supposed, would be in complete ignorance that more was done. But if the railway company, in the case supposed, could have been fixed with knowledge that more was done than merely changing the custody, and knew that the company's servants were transferring the property from one who had it in fact to another who was going to use it up, the question would be nearly the same as that in the present case. It would, however, be very difficult, if not impossible, to fix a railway company with such knowledge.

(1) 11 C. B. 977.

(2) 5 B. & A. 247.

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And on the same principle I take it the ruling of Lord *Tenterden* in *Greenway* v. *Fisher* (1) may be supported; for the packer was merely giving facilities for the transport of the goods from one place to another, and was ignorant of the circumstances which made it wrong against the true owner to remove the goods, though I admit that his decision is not put by Lord *Tenterden* on this ground, but on that of the packer's being a public employment, which I think my Brother *Brett*, in his judgment below, correctly shews to be a mistaken ground; I think the public nature of his employment was strong evidence that he was doing no more than assist in the change of custody, which was, on the principle suggested, excused in one ignorant of all that made the change of custody wrongful, but I do not see how in itself it made any difference. A packer is not, like a carrier or innkeeper, bound to receive all goods brought to him.

I think, however, it is but candid to admit that the principle I have submitted to your Lordships, though it will solve a great many difficulties, will not solve all.

In *Comyns*' Digest (2) it is said, "If a man deliver the oats of another to *B.* to be made oatmeal, and the owner afterwards prohibits him, yet *B.* makes the oatmeal, this is a conversion:" *Per Berkly*, 1638.

To this every one would agree; but suppose the miller had honestly ground the oats and delivered the meal to the person who brought the oats to him before he even heard of the true owner. How would the law be then? Or suppose the Plaintiffs in the case at your Lordships' Bar had, for some reason, brought the action against *Micholls*' men who assisted in turning this cotton into twist? The principle I have suggested would hardly excuse such conversions; and yet I feel that it would be hard on them to hold them liable. If ever such a question comes before me, I will endeavour to answer it. I think it is not necessary now to do so, for I think that what the Defendants are found to have done in the present case amounts to a conversion, and is not in any way excused.

I do not rely on the ground, taken in the earlier part of my

(1) 1 Car. & P. 190. (2) Action on the Case—Trover, E.

Brother *Cleasby's* judgment below, that the Defendants themselves were the purchasers from *Bayley*, for though, if it were left to me to draw inferences of fact, I should draw that inference. I doubt if it is open to me so to do after the finding of the jury affirming that the Defendants were agents. But though it is to be taken in favour of the Defendants that they acted throughout as brokers, and only as brokers, for *Micholls*, I still think them guilty of a conversion.

The case against them does not rest on their having merely entered into a contract with *Bayley*, or merely having assisted in changing the custody of the goods, but on their having done both. They knowingly and intentionally assisted in transferring the dominion and property in the goods to *Micholls*, that *Micholls* might dispose of them as their own, and the Plaintiffs never got them back. It is true they did it as brokers for *Micholls*, and not for any benefit for themselves; but that is not material: see *Parker* v. *Godin* (1). There, "the jury (considering the Defendant acted only as a friend, and that it would be hard to punish him) found a verdict for the Defendant. But upon application to the Court, a new trial was granted, upon the fact of its being an actual conversion in the Defendant, notwithstanding he did not apply the money to his own use."

No doubt in that case the friend, it may be inferred, knew of the bankruptcy, and was therefore not an innocent party. But that remark will not apply to *Stephens* v. *Elwall* (2), where Lord *Ellenborough* says: "The clerk acted under an unavoidable ignorance and for his master's benefit when he sent the goods to his master, but nevertheless his acts may amount to a conversion; for a person is guilty of a conversion who intermeddles with my property and disposes of it, and it is no answer that he acted under authority from another, who had himself no authority to dispose of it." No case harder than that of the Defendant in *Stephens* v. *Elwall* (2) can well be imagined, unless, perhaps, that of a sheriff who seized the goods which, in consequence of a secret act of bankruptcy, had become the goods of the assignees. He was liable to them in trover: see *Garland* v. *Carlisle* (3). The Legis-

(1) 2 Str. 813. (2) 4 M. & S. 259.
(3) 4 Cl. & F. 693.

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lature altered the law to avoid that hardship, making the loss in future fall on the assignees; and the Legislature may, to avoid the hardship on persons situated like the Defendants, extend the protection now given to purchasers in market overt, and to persons dealing with agents intrusted under the Factors Acts, to brokers dealing with any one in the ordinary markets. Those who agree with the opinion expressed by the Lord Chief Baron (1) that it is unreasonable and unjust that they should be bound, at their peril, to inquire into the title of the sellers with whom they deal, would support an alteration of the law to that effect, Many, having regard to the interest of the true owners of goods, would object to it. But I think that the law as it exists does not protect such brokers.

The conversion in the case of *Stephens* v. *Elwall* (2) consisted in assisting in transferring the goods from *Deane* to the Defendant's master in *America*, with intent to transfer *Deane's de facto* property to the Defendant's master. *Deane's* title was bad against the Plaintiffs, who were assignees of *Spencer*, because he had bought them from *Spencer* after an act of bankruptcy, though of that the Defendant was ignorant, unavoidably ignorant, says Lord *Ellenborough*.

The conversion in the present case consists in, by means of the delivery order, transferring the goods from *Bayley* to *Micholls* with intent to transfer *de facto Bayley's* property to *Micholls*. *Bayley's* title was bad against the now Plaintiffs, though of that the Defendants were ignorant. I can see no possible distinction between the two cases. No doubt *Stephens* v. *Elwall* (2) may be overruled in this House, but I do not think it wrong, and no decision cited, or of which I am aware, seems to me in conflict with it. *Ross* v. *Johnson* (3), cited by my Brother *Brett*, is not in point. There the Defendant had received goods as Plaintiff's warehouseman. They were lost, and the ruling of the Court was, that though an action might lie for negligence, if there was any, there was no conversion.

The *Lancashire Wagon Company* v. *Fitzhugh* (4) was an action for the injury to the reversionary interest of the Plaintiffs in

(1) Law Rep. 7 Q. B. 641.
(2) 4 M. & S. 259.
(3) 5 Burr. 2825.
(4) 6 H. & N. 502.

certain goods let to one *Pell* for a term. The sheriff had seized and sold those goods under an execution against *Pell*. He had a right to sell *Pell's* limited interest, but none to sell the Plaintiffs' interest, and the question raised, or at least intended to be raised, on the record was, whether the sheriff had done anything injurious to Plaintiffs' interest. I have failed to see how the decision bears upon the point now in dispute, except in so far as the decision, that though a sale is no conversion, a sale and delivery to one who uses the goods is, makes against the Defendants.

MR. JUSTICE BLACKBURN.

I need hardly say, that where there has been so great a difference of judicial opinion, I express my opinion with diffidence; but the reasons I have given lead me to form the opinion I have expressed, and I therefore answer your Lordships' question in the affirmative.

MR. JUSTICE MELLOR:—

MR. JUSTICE MELLOR.

The real difficulty in this case arises, in my opinion, not so much upon the facts as they are set out in the case and as they appeared at the trial before Mr. Justice *Willes*, but upon what arose *at* the trial, and upon the finding of the jury in answer to questions put by the learned Judge, and upon which answer, whilst directing a verdict for the Defendants, he reserved leave to the Plaintiffs to move to enter a verdict for them for £266 3*s*. 2*d*. The questions put to the jury were whether "the thirteen bales in question were bought by the Defendants as agents in the course of their business as brokers, and whether they dealt with the goods only as agents to their principals."

The jury having answered both the questions, so left, in the affirmative, the learned Judge directed the verdict to be entered for the Defendants, reserving leave to the Plaintiffs to move to enter the verdict for them, for the value of the said thirteen bales, viz., £266 3*s*. 2*d*.

It was not incumbent on the Plaintiffs' counsel to accept that reservation, and if he had then expressed his dissent from it, it could not have been made, and his only remedy then would have been to move for a new trial on the ground of misdirection by the Judge, in case he had directed a verdict upon those find-

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ings to have been entered for the Defendants. In fact, the counsel for the Plaintiffs did move in the Court of Queen's Bench for a rule to shew cause why the verdict entered for the Plaintiffs should not be set aside on the grounds, firstly, that the verdict was against the weight of evidence; secondly, on the ground of misdirection; and thirdly, why the verdict should not be entered for the Plaintiffs for £266 3*s.* 2*d.* pursuant to the leave reserved.

The Court granted the rule on the last ground, but refused it on the first two. I was not present when that rule was moved, and am not aware for what reasons the Court refused it.

It certainly was unfortunate that the rule was not granted on the ground that the verdict and finding of the jury were against the weight of evidence, as I think that the true result of the facts now stated, and then proved, was inconsistent with the finding of the jury upon which the reservation was made. The consequence is that the case must now be considered upon the basis of that finding, and the question arises whether your Lordships are bound, and to what extent, by the precise terms in which it is expressed.

I have reason to believe that the Judges are not agreed as to the true limits of the reservation.

Baron *Martin*, in his judgment in the present case (1), in which he considers the case independently of the finding of the jury, treats such finding as "immaterial;" that expression is, I think, too strong when applied to the circumstances under which such a reservation takes place at Nisi Prius.

The reservation is in the nature of a convention between the Judge, the jury, and the counsel, that instead of a general verdict being taken, specific questions shall be asked of the jury, and if they answer them the verdict shall nevertheless be entered for the Plaintiff or Defendant as the case may be, subject to the opinion of the Court out of which the record comes, upon the answers to those questions either alone or in connection with the several facts of the case, but with this bargain, that the answers of the jury embodying the inferences which they have drawn, are to bind the parties as being the true inferences to be drawn from the facts involved in the questions, and thus control the Court in

(1) Law Rep. 7 Q. B. 634.

considering how the verdict shall ultimately be entered. In the present case the jury found that the thirteen bales in question "were bought by the Defendants as agents in the course of their business as brokers, and that they dealt with the goods only as agents to their principals."

I am of opinion that whatever view your Lordships might otherwise be disposed to take as to the true inferences which ought to be drawn from the facts as they appear, you are bound by the agreement of the parties to accept the finding of the jury so far as the inferences drawn by the jury do not involve the introduction of new facts, which did not appear on the trial. In other words, I think that the terms of the finding cannot be construed so as to contradict, or control, the fact that, at the time when the purchase was made by *Hollins* from *Bayley*, he had really no principal by whose authority and on whose account he purchased the cotton in question. The argument raised in the Court of Exchequer Chamber, and now before your Lordships, was not insisted upon on behalf of the Appellants before the Judges who decided this case in the Court of Queen's Bench. I am consequently induced to think that the Appellants' counsel did not then consider the effect of the reservation so conclusive as is now contended for. The case was really argued at large, and my Brother *Lush* said: "It is unnecessary to consider what the liability of the Defendant would have been, if he had bought these goods *quâ* broker for his principal. That is not necessary for us to consider, because in fact he did not do so. He bought them as principal. If he chose to let *Micholls* have them, or any other person have them, he could do so; he had as full power over them as any other merchant has who buys on his own account; that amounts to all intents and purposes to a sale, and therefore he did buy the goods and did sell the goods."

And my Brother *Hannen* expressly said: "This is not the case of a mere broker dealing with the goods only in that character. When that case arises the question will be, whether the authority of *Greenway* v. *Fisher* (1) is applicable to it. Neither is it the case of a person in no way exercising a dominion over the property or over the goods themselves, but acting in a mere

(1) 1 Car. & P. 190.

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subsidiary character, like that of a person who has the goods of a person employing him to carry them, or a caretaker, such as a wharfinger."

It becomes, therefore, of essential importance to the decision of this case clearly to define how far your Lordships are controlled by the finding of the jury, every word of which requires to be considered. If it can be read, as suggested by Baron *Martin*, as a finding only that the Defendants intended to act as brokers in what they did, then I should agree with him that such intention is not material, if the acts they did were *ultra* the dealing of a mere broker. A broker is well defined by my Brother *Blackburn*, in his work on the Contract of Sale (1), and quoted and approved by Mr. Justice *Hannen* in his judgment in the case of *Robinson* v. *Mollett* (2): "A broker for sale is a person making it a trade to find purchasers for those who wish to sell, and vendors for those who wish to buy, and to negotiate and superintend the making of the bargain between them."

If the above definition of the business of a broker is correct, as I have no doubt that it is, *F. Hollins* in this case did, really and truly, do acts not within the true business of a broker, because, in fact, having at the time of this transaction with *Bayley* no principal, but merely believing that the cotton would suit an expected customer, he purchased it in his own name, and on his own account, and upon the speculation that it might or might not suit a particular customer; and if *Micholls*, when he arrived at *Liverpool*, had refused to take the cotton so purchased, nobody can doubt that the cotton would have remained the property of *Hollins*. It did, however happen, as *Hollins* had expected that it would, that *Micholls* agreed to take to the cotton, and Messrs. *Hollins* only charged the usual commission as the profit on the price. In legal effect, however, it was, as it appears to me, a re-sale by *Hollins* to *Micholls* at a profit equal to commission on the cotton, which was delivered by *Bayley* to a carman employed by *Hollins*, and delivered at the railway station to the address of *Micholls & Co.*

If this is the real result of the facts, I am of opinion that this dealing by the Defendants with the cotton amounted to a conversion, and as the property in the cotton had never passed from the

(1) Page 81. (2) Law Rep. 7 C. P. at p. 97.

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Plaintiffs to *Bayley* by reason of the fraud of *Bayley*, in his dealing with the Appellants, then the case comes within that of *Hardman* v. *Booth* (1). If however, by reason of the finding of the jury, I must eliminate from the facts that the Plaintiff in Error bought the cotton having at the time no principal, and substitute for it a statement that he bought the cotton as agent for *Micholls & Co.*, and merely passed the delivery order and transported the cotton as their agent, in the usual course of his business as broker, then, I think, that Messrs. *Hollins* would not be liable in this action, and the remedy of the *Fowlers* would be against *Micholls & Co.*, who actually converted the cotton by spinning it into yarn and selling it. But I confess that I cannot so treat the finding, but am bound to read it by the light of the facts as they really appeared at the trial, and to consider that the jury intended to convey only the opinion that the Appellants in all that they did, intended only to act as brokers to such principal as the cotton might suit.

This is what I think that the jury must be taken to have intended to convey, and not that Messrs. *Hollins* had at the time a principal in point of fact.

I cannot believe that the counsel for the Plaintiffs below would ever have consented to such a reservation if they had thought it was intended to contradict so essential a fact.

I come, therefore, although not without the gravest doubts, to the conclusion that the judgment entered for the Plaintiffs was right.

I forbear to state the facts more at large, as they appear in the judgments of the Judges who heard the case in the Exchequer Chamber, and all the authorities which bear upon it are collected in the notes to *Wilbraham* v. *Snow* (2).

My answer to your Lordships' question is, that the Plaintiffs were entitled to have a verdict entered for them for the value of the thirteen bales of cotton mentioned in the declaration.

MR. JUSTICE BRETT:—

MR. JUSTICE BRETT.

In the judgment which in this case I delivered in the Exchequer Chamber, I endeavoured to fix exactly the question which

(1) 1 H. & C. 803. (2) 2 Wm. Saund. 47, in the last Ed. pp. 102 to 110.

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had to be determined. I did so because I thought, with deference, that it had been overlooked in the judgments given in the Court of Queen's Bench. I venture again to draw attention particularly to the same point, because I think it has been disregarded by some of the Judges in the Exchequer Chamber. In the Queen's Bench, *Mellor*, J., says: "It is needless to consider now, whether if the Defendant *Hollins* had expressly purchased these goods for *Micholls, Lucas, & Co.*, he would have had a good defence to this action, because that point did not, in fact, arise. It would seem that these goods were bought on speculation, &c. Then, the Defendant, being alone responsible to the seller, deals with the goods by selling them to a third party." *Lush*, J., says: "It is quite unnecessary to consider what the Defendant's liability would have been if he had bought for a principal, because it is clear that he bought on his own account and then sold the goods." *Hannen*, J., says: "This is not the case of a mere broker dealing with the goods in that character. For if *Bayley* had had the title in him to sell this commodity, the actual property in the goods would have been in the Defendants." Each of the Judges bases his decision on an interpretation of the evidence by which he concludes that *Hollins* bought as a principal from *Bayley*, and sold as a principal to *Micholls & Co.*

Martin, B., in the Exchequer Chamber, interprets the finding of the jury to mean "that cotton brokers deal with cotton in the same manner as the Defendants dealt with this cotton. For no man, he says, can doubt but that the Defendants bought the goods as principals from *Bayley;* secondly, that they dealt with them only as agents to their principal. This finding is in my judgment immaterial; whether a man who deals wrongfully with my goods be an agent or principal seems to me to be of no consequence." In another part, he says: "In one sense the finding was correct; I have no doubt the Defendants throughout meant to act as brokers; but in another sense I think it incorrect. I think the facts shew a sale by *Bayley* to the Defendants, and a re-sale by them to *Micholls & Co.*" This judgment either relies upon that last interpretation of the facts, or upon a proposition of law, that every agent who deals with another person's property, in the sense of having it in his possession for any other purpose than

holding it for the true owner, is, by the mere fact of so doing, liable to the true owner in trover. *Cleasby*, B., founds his judgment on this: "It was therefore in this right, as the persons entitled to the possession of the cotton as buyers from *Bayley*, that the Defendants obtained possession of it for the purpose of transferring the property in it to their principals, *Micholls & Co.*, and this dealing with the property appears to be a clear conversion upon all the authorities. The Defendants acted as brokers, but from the circumstances attending the contract they became themselves interested in it." This judgment seems to be founded on the view that the Defendants became principals in the purchase of the cotton so as to buy as principals from *Bayley* and sell as principals to *Micholls & Co.* It is because all these judgments are founded upon the same interpretation of the evidence, and of the findings of the jury, that I venture, as I have said, to call particular attention to the direction of *Willes*, J., to the findings of the jury, and to the form of the leave reserved. They can be best understood by considering the course of business with which the Judge and jury were dealing. What is that course of business?

Liverpool is the cotton mart for *Lancashire* and *Yorkshire*. A *Liverpool* cotton broker instructed to purchase makes contracts in *Liverpool* for the purchase of cotton by his clients in the country districts. He informs his country client of the completion of the contract by a bought note forwarded to him in the country. The cotton is at the time of the contract usually warehoused in *Liverpool*. If the cotton has been bought by sample, or according to one of the *Liverpool* known enumerations of kind or quality, the country client may desire to exercise an opinion on the cotton purchased for him. If so, he requests the broker to obtain for him a bulk sample, which the broker does, and forwards it. Again, the country client does not require immediate delivery from the *Liverpool* warehouse; but when later he does, he requests his broker to forward the cotton. The broker then obtains or signs a delivery order, and by a carter receives delivery from the warehouse, and forwards the cotton to a *Liverpool* railway station. This is done generally after the broker has had many transactions in cotton passing through

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his hands for other clients. It is an addition to the more regular business of brokers, which *Liverpool* cotton brokers have undertaken. It was in order to test the legal effect of this new course of business, and the liability of the brokers who carry it on, in the case of the immediate seller, through them of the cotton, being fraudulent or unauthorized to sell the cotton, but such defect being unknown to the broker, that *Willes*, J., left two questions to a *Liverpool* special jury, first, whether the thirteen bales were bought by the Defendants as agents in the course of their business as brokers; and, secondly, whether they dealt with the goods only as agents for their principals. When a question in the form of either of these is put to a jury, there is, of course, always the antithetical proposition, perfectly well understood by the jury, and the facts material to which are discussed by the Judge in summing up the evidence. The real expansion, then, of the questions, as applied to the course of business and its effect, was, first, did the Defendants make the contract as agents for principals, *i.e.*, acting merely as brokers to make a contract, or did they buy from one and sell to the other; and, secondly, did the Defendants take and make delivery with reference to a contract between two parties, that is to say, with a view to bind the contract to specific goods, or to pass the property in goods from one party to the other, or were they simply acting as agents of a person to whom goods were assumed already to belong, to forward his own goods to him. The alternative propositions must have been just as much before the jury as the primary ones, expressly reported to the Court by the Judge. That this was the meaning intended by the Judge and understood by the jury seems to me plain from the terms of the leave reserved, which are that the verdict may be entered for the Plaintiffs, if the Defendants, having acted throughout honestly, in the ordinary course of business, having bought and paid for the cotton only as agents for *Micholls, Lucas & Co.*, and having dealt with the goods only as agents to forward them, were answerable for the value of the thirteen bales of cotton as having converted them to their own use. I venture to say and to press upon your Lordships that, upon such a reserved leave, which cannot be reserved without the consent of both parties to the suit to its terms, neither the Court of Queen's

Bench, nor the Judges in the Exchequer Chamber, had any right to put upon the questions, answer, or evidence, any other interpretation than that which is put by the leave reserved, and I venture to repeat that, otherwise, parties will not consent that leave should be reserved. Yet every one of the judgments to which I have referred otherwise interprets both the questions and the evidence, and resolves that the evidence proved precisely the propositions which the jury negatived, and is inconsistent with the propositions which the jury affirmed. And far from agreeing with the learned Judges who thus pronounce the verdict to be contrary to the evidence, I humbly agree with *Willes*, J., who was satisfied with the verdict, that in truth and in fact the verdict was right, that the Defendants did make the contract for principals, and that in forwarding the cotton they had no question of property in their mind. If any property in this cotton could have passed, it would have passed by the contract, and not by the subsequent forwarding. It is impossible to my mind to suppose that *Willes*, J., could have reserved a question of law for the opinion of the Court, if the questions left by him, or the evidence, could be interpreted as they have been in those judgments. To hold as the Judges have held, is either to hold that the jurors have answered the questions wrongly, or that the questions were immaterial; in one case, that the verdict was against the evidence, in the other that *Willes*, J., notwithstanding the answers, ought to have directed the verdict to be entered for the Plaintiffs, and therefore was guilty of misdirection. Yet the Court of Queen's Bench refused to grant a rule as for misdirection, or as for a verdict against evidence, and confined the discussion to whether the verdict should be entered for the Plaintiffs on a count in trover, on the assumption, as I submit, that the interpretations put upon the questions of the Judge and the answers of the jury, by the leave, are correct. I submit, therefore, that the very foundation of this case is that the Defendants made the contract as agents and brokers only, and that they did not buy or sell as principals, and that in obtaining the sampling order and sample, and in obtaining or signing the delivery order, and in receiving and forwarding the cotton, they acted, so far as knowledge or recollection and intention went, merely as agents for

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Micholls, Lucas, & Co., to examine for them, to receive for them, to forward to them, goods assumed at the time to be their goods without any reference to the contract by which the goods became theirs. The question of law is, whether such dealing with goods can lay a mere agent open to an action of trover. The question in business, and it is a most important one for *Liverpool*, is, whether the cotton brokers of *Liverpool* may with safety, so long as they do no more, add to their proper function of brokers the business of forwarding cotton to the *Liverpool* stations for their clients. If they may, it seems to be an addition to their business of mere brokers innocent as regards others, and convenient for them and their clients. If the brokers may not safely perform this small function of forwarding to the station, another agent must be introduced by the country principal to do it, to the great inconvenience of such principal.

The real question, which I cannot doubt it was the intention of Justice *Willes* to have discussed, is, whether every actual dealing with a chattel in a manner inconsistent with the right of a true owner gives to the true owner a right of action in trover against every person so dealing, except a common carrier, or whether the dealing with the chattel, in order to support against him who has dealt with it an action of trover, must not be with intention to interfere with the property in the chattel. I believe that he desired to have set at rest the divergence of opinion on this point between Baron *Martin* and the other Barons in the case of *Burroughes* v. *Bayne* (1). In that case Baron *Martin* says (2): "But the word 'conversion,' by a long course of practice, has acquired a technical meaning. It means detaining goods so as to deprive the person entitled to the possession of them of his dominion over them." Farther on he explains what he intends by this. He quotes from the judgment of *Alderson*, B., in *Fouldes* v. *Willoughby* (3), thus: "Any asportation of a chattel for the use of the Defendant or a third person amounts to a conversion, for this simple reason, that it is an act inconsistent with the general right of dominion which the owner of the chattel has in it, who is entitled to the use of it at all times and in all places. When,

(1) 5 H. & N. 296. (2) 5 H. & N. 302, 303.
(3) 8 M. & W. 540.

therefore, a man takes that chattel, either for the use of himself or another, it is a conversion." "I," says *Martin*, B., "entirely accede to this view of the law, which is simple and of easy application." It is obvious that *Martin*, B., took a very large view of the term "conversion." And that the question of the right interpretation of the term is very important, for upon it may depend whether a Defendant is to be held liable in trover for the full value of the chattel in dispute or in trespass for perhaps only nominal damages. In the same case of *Burroughes* v. *Bayne* (1), *Channell*, B., says: "I desire it to be understood that I do not mean to state, or suggest, that every detention is a conversion, I guard myself against any such supposition. Every asportation is not a conversion, and therefore it seems to me that every detention cannot be a conversion. If it were, the mere removal of a chattel, independently of any claim over it in favour of the party himself, or any one else whatever, would be a conversion. The asportation of a chattel for the use of the Defendant or third person amounts to a conversion, and for this reason, whatever act is done inconsistent with the dominion of the owner of a chattel at all times and places over that chattel is a conversion. On the other hand the simple asportation of a chattel, without any intention of having farther use of it, though it may be a sufficient foundation for an action of trespass, is not sufficient to establish a conversion." *Bramwell*, B., says (2): "It certainly is not every detention of goods, although there is no right to detain them, that is a conversion, in my judgment at all events." Again: "The result is, you must in all cases look to see not whether there has been what may be called a withholding of the property, but a withholding of it in such a way as that it may be said to be a conversion to a man's own use." Again: "If I am to be considered as having wrongfully detained them, though you went away and sent for them the next morning, your damages are a farthing. Instead of which, by the use of the word 'conversion,' the Defendant is made liable for the value of the billiard table, which he cannot recover from any one else. Therefore, on consideration of all the facts, had I been one of the jury, I should

(1) 5 H. & N. at p. 305.

(2) 5 H. & N. at pp. 308, 309.

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have found that there was not an assertion of dominion inconsistent with the title of the Plaintiff, &c." In the judgment in the Exchequer Chamber, *Martin*, B., repeated the same view of a conversion which he had stated in *Burroughes* v. *Bayne* (1): "But as regards the action of trover," he says, "I think it is well settled that the assumption and exercise of dominion—and asportation is an exercise of dominion—over a chattel, inconsistent with the title and general dominion which the true owner has in and over it, is a conversion, and that it is immaterial whether the act done be for the use of the Defendant himself or of a third person." Now the greater part of the propositions thus enunciated by *Martin*, B., are identical with the propositions of the other Judges. All, I think, agree that the assumption and exercise of dominion over a chattel, inconsistent with the title of the true owner, is a conversion. All would agree that the detaining goods so as to deprive the person entitled to the possession of them of his dominion over them is a conversion, if by the word "dominion" in the last proposition is intended "title as owner." The essential difference between the view of Baron *Martin* and the other Judges I have mentioned is in the sense in which this word "dominion" is used by him and them. When Baron *Martin* speaks of interfering with the dominion of the true owner, he means interfering with the mere possession or right of possession of the owner. The other Judges mean an interference or dealing with, or doing some act in negation of, the title as owner of the true owner. Baron *Martin* holds that every asportation or detention which cannot be justified, *i.e.*, which is not done for the true owner, is a conversion. Baron *Channell* and Baron *Bramwell* hold that a mere simple asportation or detention is not of itself a conversion, but only when either is done in a manner or with an intention inconsistent with the proprietary title, as owner, of the true owner. If the findings of the jury in the present case are to be treated as I have suggested they should be treated, then the question in this case is, what is the proper definition of the term "conversion" in a case in which an asportation of the chattel is relied on as the conversion. If the first finding is to be treated as a

(1) 5 H. & N. 296.

binding decision that the Defendants in making the contract acted only as brokers, so that they did not themselves buy the cotton as buyers, and so that they did not sell it as sellers, then what they thus did is clearly, I think, no conversion. The reasons for this I gave in my judgment below. If the second finding is treated as a decision that the asportation was a mere simple asportation, made without intention of or relation to interference with any one's title, then such asportation is no conversion unless the definition of *Martin*, B., is preferred to that of Barons *Bramwell* and *Channell*. It cannot fail to be observed that the definition of *Martin*, B., includes the cases of a carrier, wharfinger, warehouseman, and packer, even when there is no demand and refusal; and that in order to meet the difficulty, he, in his judgment in the Exchequer Chamber, declares that the case of a carrier is to be excepted, because he is bound by law to receive and carry the goods of every one who brings goods to him; and that the case of a packer is not properly an exception, and that the case of *Greenway* v. *Fisher* (1) is wrongly decided. I endeavoured in the Exchequer Chamber to explain all the cases which are called exceptional, by shewing that the definition of a conversion laid down by *Bramwell* and *Channell*, BB., is the correct definition, and that if so, the cases referred to are properly decided, not because they are exceptions to, but because they are outside the rule. I cannot assist much farther upon this point than I endeavoured to do in that judgment, to which I beg to refer. In addition, however, I may say that in *Simmons* v. *Lillystone* (2) *Parke*, B., says: "Here the Defendant never intended to take to himself any property in the timber," and, "We are all of opinion that there was no sufficient evidence of a conversion. In order to constitute a conversion there must be an intention of the Defendant to take to himself the property in the goods, or to deprive the Plaintiff of it." If the last phrase be expanded, it clearly means "or to deprive the Plaintiff of the property in the goods." In *Chitty* on Pleading (3) it is said: "There may be a conversion, 1st, by wrongfully taking a personal chattel; 2ndly, by some other illegal assumption of ownership, or by illegally

(1) 1 C. & P. 190. (2) 8 Ex. 437.
(3) Vol. i. tit. Trover, p. 172, Ed. 1844.

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using or misusing goods; or 3rdly, by a wrongful detention." Looking to the phraseology of the second branch, which speaks of "some other assumption of ownership," it is obvious that the taking in the first branch is a taking as in right of ownership in the defendant, or in some one other than the Plaintiff. In explaining the second branch, the learned author says: "So the wrongful assumption of the property in goods may be a conversion of itself, or the wrongful assumption of a right of disposing of them." And under the latter, he gives as instances a wrongful user of the goods, *i.e.*, I apprehend, a user as if the Defendant or some one other than the Plaintiff were the owner, and a misuser by the Defendant, as by breaking bulk, or consuming, or transforming, which are all cases of the exercise of acts as of ownership. It seems apparent to me that a claim or exercise of ownership is throughout in the mind of the author as the reason of his producing the cases as examples of "actual conversion." And then he proceeds to the third head, and says: "A demand and refusal are necessary in all cases where the Defendant became in the first instance lawfully possessed of the goods, and the Plaintiff is not prepared to prove some distinct 'actual conversion.'" That is to say, as it seems to me, that in order to prove a conversion, you must give evidence either of "an actual conversion," which consists in the Defendant taking or using the goods with the intent to exercise an act of ownership on his own behalf, or of some one other than the Plaintiff, or of a conversion by reason of a refusal on demand. I conclude, therefore, as before, that the Defendant cannot be properly made liable in trover on the first part of the leave reserved in this case, because he was acting only as a broker, to make a contract between other parties, and none with himself; nor on the second part of the leave reserved, because the Court was bound to treat the asportation, which was relied on as an actual conversion, as a simple asportation made without intent to interfere in any manner with the title of or ownership in the cotton. I cannot agree with the view which seems to me to be expressed by *Martin*, B., in *Burroughes* v. *Bayne* (1), that the action of trover is equivalent to an action of trespass, and was invented in order to replace the action of detinue, avoiding only

(1) 5 H. & N. 296.

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the right of the Defendant to wage his law. I believe that it was invented in order to provide a remedy in damages, where there has been a trespass, and more than trespass to goods, namely, acts done with the intention of transferring or interfering with the title to or ownership of them, or which are done as acts of ownership of them, or where without an original trespass there have been acts done with the intention of transferring or interfering with the title to or ownership of them, or which have been done as acts of ownership of them. I am still of opinion that a possession or detention which is a mere custody or mere asportation made without reference to the question of the property in chattels is not a conversion. I answer your Lordships' question by saying that in my opinion the judgments in the Court of Queen's Bench and Exchequer Chamber ought to be reversed, and that judgment in the action ought to be entered for the Defendants.

MR. BARON CLEASBY.

MR. BARON CLEASBY:—

The question proposed by your Lordships to the Judges in this case was, whether under the circumstances stated in the joint case on appeal, the Respondents were entitled to have a verdict entered for them for the value of the thirteen bales of cotton mentioned in the declaration.

It will be convenient to describe the parties as Plaintiffs and Defendants in the original action, and as there is no doubt that the cotton was the property of the Plaintiffs, the question arises whether the Defendants so dealt with the property of the Plaintiffs as to be guilty of a conversion, and so responsible for the value.

The answer to this question depends, in my view of the case, upon the effect of the acts done by the Defendants.

It appears that a firm, *H. K. Bayley & Co.*, had obtained possession of the cotton in question by means of a fraud, and offered it for sale.

The effect of the statement in paragraph 8 is, that the Defendants became themselves the purchasers of the thirteen bales at $11\frac{1}{4}$, along with twenty-five other bales at $11\frac{1}{8}$. The language of the memorandum is unambiguous.—"We sell you thirteen bales $11\frac{1}{4}$, 25 bales $11\frac{1}{8}$."

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The real nature of the transaction appears to have been this:— It was, it seems, not uncommon for the Defendants, who were cotton brokers, to buy cotton themselves, in the expectation of being able to find some customer to take it off their hands. And the object of this mode of dealing is obvious. The Defendants by themselves contracting to buy, secured the sale of the cotton, whereas if they had not bought, some other broker might have stepped in during the day and negotiated the sale and earned the commission.

It is clear that after making the contract the Defendants might have sold to any customer that presented himself, which they could not have done if they had bought for *Micholls & Co.* It follows from this that *Micholls & Co.* were not, in any proper sense of the term, their principals at the time of the purchase, though they were expected to be so. It is also obvious that if the Defendants had made a contract at the time for any other person they would have made and signed a contract note as buying for principals (who need not necessarily be named), and have charged *Bayley & Co.* the brokerage or commission in the usual manner. But instead of doing this, and so making a contract for *Bayley & Co.*, they make an absolute contract of purchase with them. The fact that Mr. *Hollins* said he would send in the name of his principal during the day could not prevent this from being an absolute contract of purchase. Indeed it was not contended in the argument that it did so. As it was not intended that the Defendants should buy the cottons and sell again at a profit, but should act as brokers, Messrs. *Bayley* were entitled to know the name of the purchaser.

The cotton is described as bought that day for *Francis Hollins & Co.* (the Defendants).

Having thus become the purchasers of the cotton, the Defendants at once caused samples to be taken from it, for the purpose, of course, of disposing of it.

This dealing with the cotton itself by a person claiming at the time to be the owner, is doing an act inconsistent with the title of the real owner, and a question might certainly be raised whether the real owner would not be entitled either to make it the founda-

tion of a claim for damages, or, if he thought proper, treat it as such an intermeddling with his property upon a claim of right as to amount to a conversion. But it is unnecessary to consider this, because the Defendants, having sampled the cotton, afterwards sell it to the person who they expected would buy it, and they then deliver it. So that in the present case the Defendants both buy and sell the cotton, and they are themselves interested in the contract of purchase, and of course interested in the contract of sale, and they intermeddle with the cotton itself by sampling it when purchased and by delivering it when sold.

If this was the ordinary case of a broker merely acting as middle man and making the contract between two principals and having himself no interest in either contract, then the mere making the contract would not, I conceive, involve any responsibility to third parties. And how far the intermedding with the goods themselves by delivering them would do so admits of question, and was the subject of much argument at the Bar, and might depend upon the extent to which the broker in each case could be regarded as having an independent possession of the goods, and delivering them for the purpose of passing the property. For example, an auctioneer delivers possession for the purpose of passing the property, and it would not be disputed that he would be liable, as upon a conversion, to the real owner. But according to my view of the present case no such question of difficulty arises, because the Defendants took upon themselves the character of purchasers for the profitable carrying on of their business as brokers, and having thus bought the cotton, they afterwards, equally for their own profit, dispose of it by sale and delivery, and receive the purchase-money.

This appears to be a correct view of the facts, and if it be so there is a clear conversion, and it is unnecessary to trouble your Lordships by a reference to any of the numerous authorities as to what acts done by persons acting as agents only, and without themselves having an interest, may be treated as conversions.

There is a possible state of facts in which the question would have been raised more favourably for the Defendants. The Defen-

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dants were undoubtedly, as I submit, the purchasers in the first instance, but after the sale by them to *Micholls & Co.* there might have been as between *Bayley* and the Defendants what is called a novation, or substitution of a contract of sale between *Bayley & Co.* and *Micholls & Co.* for the contract between *Bayley & Co.* and the Defendants. In that case it might have been said that the contract of purchase made by the Defendants was at an end, and the delivery of the goods is under a new contract between *Bayley & Co.* and *Micholls & Co.* in which the Defendants were only acting in the ordinary character of brokers, and so the question would arise which was so much argued. But the facts of the present case negative any such novation or destruction of the original purchase between *Bayley* and the Defendants.

This appears distinctly; for after the delivery order is sent by the Defendants to *Bayley*, in which, in compliance with their promise, they gave the name of their principals, *Micholls & Co.*, *Bayley* sent in the invoice, and in it the Defendants, and not *Micholls & Co.*, are made the debtors. The heading being Messrs.

"*Francis Hollins & Co.*—Bought of *H. K. Bayley & Co.*"

And we thus find *Bayley*, with knowledge of the names of the Defendants' principals, insisting upon the liability of the Defendants who contracted with them.

What follows agrees with this, for the cotton is afterwards delivered by *Bayley & Co.* to a carman employed by the Defendants (and with whom they contract upon terms not agreeing with those charged to their customers), and the transaction is consistently closed by the Defendants (not *Micholls & Co.*) paying *Bayley* for the cotton and then receiving the price with the addition of their commission from *Micholls & Co.*

In dealing with the facts as found in the case on appeal, I have not done so in a manner inconsistent with what must be taken to have been the opinion of the jury, because I have throughout considered the Defendants as acting in the character of brokers and agents, but the manner of carrying on their business made them personally interested in the contract made by them, and so personally responsible for their acts.

If the jury had found (contrary to the fact) that the Defendants

were acting as brokers of *Bayley & Co.* in the transaction, a real difficulty would have been introduced by this inconsistency. But they have not done so, and have left the transaction to speak for itself, "We sell you thirteen bales, 11¼." The Defendants, therefore, not being brokers for the sellers, and only having expectant principals, must be buyers and acquire an interest at the time.

For the reasons above given, I answer the question put by your Lordships in the affirmative, by saying that in my opinion the Plaintiffs were entitled to have a verdict entered for them for the value of the thirteen bales of cotton mentioned in the declaration.

MR. JUSTICE GROVE:—

The difficulty in this case arises from the finding of the jury; if that finding imports that the Defendants acted as agents or brokers in the sense that they were mere negotiators between seller and purchaser, or, to use the expression of the Lord Chief Baron, were mere conduit pipes, I should consider myself concluded by the finding, although I should think it against the weight of evidence. But on such a view it appears to me that on the finding there would be nothing to reserve, for it could hardly be contended, and has not been contended, that if the Defendants acted with the consent of *Micholls & Co.* to be the purchasers, and of the sellers to accept them as purchasers and to transfer to them (the Defendants being known to both parties at the time of the contracts to be mere intermediates), that they would be liable. Therefore as the learned Judge considered that there was a point of law worthy of consideration, the finding may be taken in a sense not inconsistent with the evidence, but as one which is not conclusive of the case and which leaves the point of law undecided.

Now it may well be that the jury meant, or upon this finding they may not unreasonably be taken to have meant, that the Defendants never bought intending to hold or to make a profit, but with a view to pass the goods over to *Micholls & Co.*, or if they did not accept them, to some other customer, and that therefore in

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one sense they acted as agents to principals, only intending to pocket their commission as brokers, and never thinking of retaining the goods or dealing with them as buyers and sellers. This would leave the question untouched, whether they did not exercise a volition with respect to the dominion over the goods, and whether, although they intended to act and did act in one respect as brokers, not making a profit by resale, but only getting broker's commission, they did not intend to act and did not act in relation to the sellers in a character beyond mere intermediates and not as mere conduit pipes.

Suppose for instance *Micholls & Co.* had declined the purchase, the Defendants would have looked for another purchaser, and if they found him would have sent their cart to him, and if they had found none in time, can it be contended that they would not have been liable, or as Baron *Martin* puts it, "could not *Bayley* had he been the true owner have maintained an action against them for the price." Is, then, their position different with regard to the sellers or the owners of the goods because the goods happened to suit *Micholls & Co.?* Did not the Defendants, whether as agents or principals, intermeddle with goods which were not their own, and exercise a dominion over them inconsistent with the right of the true owner?

I am of opinion that they did, and that they do not come within the exceptions or qualifications which have been recognised in cases such as those of a carrier; the exception of a broker in such cases could only, in my judgment, apply when he is a mere negotiator or intermediate between two other contracting parties, and not when he buys without authority from another to buy, and merely on the expectation of finding a purchaser. I therefore answer your Lordships' question in the affirmative.

MR. BARON AMPHLETT.

MR. BARON AMPHLETT:—

In this case I have had an opportunity of perusing the opinion of my Brother Brett, and, agreeing with it as I do, I venture respectfully to think that I shall best consult the convenience of your Lordships by not travelling over the same ground. I will, therefore, content myself with saying, in answer to your Lordships'

question, that for the reasons put forward by my Brother Brett and by the Lord Chief Baron in his judgment in the Exchequer Chamber, I think that the Respondents were not entitled to have a verdict entered for them for the value of the thirteen bales of cotton in question.

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LORD CHELMSFORD (1):—

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My Lords, the question upon this appeal is, whether the Defendants are liable in trover for the conversion of thirteen bales of cotton, the property of the Plaintiffs. From the difference of opinion which has existed among the Judges, the Court of Exchequer Chamber being equally divided, and two of the six learned Judges, of whose attendance your Lordships have had the benefit, having differed with the majority, the question may be regarded as one of some difficulty, as it certainly is one of general importance.

The Plaintiffs are merchants at *Liverpool.* In 1869 they instructed their brokers to sell the thirteen bales of cotton in question. A person named *Bayley,* a cotton broker in *Liverpool,* offered to purchase the cotton. The Plaintiffs' brokers refused to sell unless the name of a responsible person were given as purchaser. They were therefore told by *Bayley* that he was buying as broker for *Thomas Seddon,* of *Bolton. Bayley* had no authority from *Seddon* to buy for him. The brokers being ignorant of this want of authority, agreed to sell the cotton to *Seddon,* and on the 18th of December, 1869, sent to the Plaintiffs a sold note with *Seddon's* name as buyer, and to *Bayley* a bought note of the purchase by him for *Seddon.* On the same day *Bayley* sent to the Plaintiffs' brokers a sampling and delivery order for thirteen bales of cotton bought by him for *Seddon. Bayley* afterwards offered to sell the cotton to the Defendants *Francis Hollins & Co.,* who are cotton brokers at *Liverpool.* They agreed to purchase the thirteen bales at $11\frac{1}{4}d.$ per lb., and to send in the name of their principal in the course of the day. The Defendants afterwards applied to *Bayley* for an order to allow them to sample the cotton by the following note:—"*Liverpool,* 23rd December, 1869. Messrs. *F. K. Bayley & Co.*. Please allow the bearer to sample

(1) His Lordship had presided at the hearing.

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thirteen bales of cotton *ex Minnesota* at 11¼*d.* per lb. bought this day for *Francis Hollins & Co.*"

It is stated in the joint case upon appeal that the Defendants have a large number of customers, and frequently, and without any definite instructions, buy cotton, believing it will suit them; but if it should happen that a customer for whom they intended to buy the cotton will not take it, they trust to be able to place it with some other customer.

The Defendants on the morning of the 23rd of December had received a message from *Micholls & Co.*, cotton spinners at *Stockport*, for whom the Defendants were in the habit of purchasing cotton, stating that one of the partners was coming over to *Liverpool* that day to purchase cotton through the Defendants. This was the only communication which the Defendants had with *Micholls, Lucas, & Co.* this day as to buying for them any cotton. But, at the time they agreed to purchase, the Defendants intended the cotton for *Micholls, Lucas, & Co.*

About half an hour after the Defendants had agreed with *Bayley*, Mr. *Micholls* came to their office, and after seeing samples of cotton, and satisfying himself as to the quality and price, agreed to take it. Later in the day the Defendants sent to *Bayley* a delivery order, which stated that the cotton was bought for *Micholls, Lucas, & Co.* This was the first intimation *Bayley* received of *Micholls, Lucas, & Co.* being interested in the purchase of the cotton. He sent to the Appellants (whether before or after the introduction of the names of *Micholls, Lucas, & Co.* into the transaction does not appear) an invoice, in these terms: "*Liverpool*, Dec. 23rd, 1869. Messrs *Francis Hollins & Co.* bought from *H. K. Bayley & Co.* thirteen bales of cotton *ex Minnesota*, at 11¼*d.* per lb., &c."

The delivery order received by the Defendants was taken to the warehouse of *Bayley* by one of their clerks, and the thirteen bales of cotton were received by the Defendants, and conveyed to the railway station, and forwarded to *Micholls, Lucas, & Co.* at *Stockport*. The invoice price of the cotton was paid by the Defendants to *Bayley*, and the amount, together with a charge for their commission, was repaid by *Micholls, Lucas, & Co.* to the Defendants.

The Plaintiffs having applied to *Seddon* for payment for the cotton, discovered the fraudulent misrepresentation of *Bayley* that he had bought as *Seddon's* broker, by which he obtained possession of it. And learning that *Bayley* had sold the cotton to the Defendants, the Plaintiffs called upon them for payment, and upon the Defendants' refusal to pay, the present action was brought.

At the trial the above facts being proved, Mr. Justice *Willes* left to the jury two questions: 1st. Whether the thirteen bales of cotton in question were bought by the Defendants as agents in the course of their business as brokers; and, 2ndly, Whether they dealt with the goods only as agents to their principals? The jury having answered both questions in the affirmative, the learned Judge directed the verdict to be entered for the Defendants, reserving leave to the Plaintiffs to move to enter the verdict for them for the price of the cotton.

The Plaintiffs accordingly moved the Court of Queen's Bench for a rule to shew cause why the verdict entered for the Defendants should not be set aside on the grounds, first, that the verdict was against the weight of evidence; secondly, for misdirection; and, thirdly, upon the leave reserved to enter the verdict for them. The Court granted the rule on the third ground, but refused it on the other two.

Upon the argument of the rule, the Judges were unanimously of opinion that the rule to enter the verdict for the Plaintiffs ought to be made absolute, on the ground that the Defendants in effect bought as principals, and would have been liable to *Bayley* as vendees, and having dealt with the cotton as if the property was in them, by assigning it to *Micholls, Lucas, & Co.*, they were liable to the Plaintiffs for a conversion on its turning out that no property had passed from the Plaintiffs to *Bayley*. Upon the appeal to the Exchequer Chamber that Court (as I have already mentioned) were equally divided, and in this state of things the appeal is brought to your Lordships' House.

In considering the case it is necessary, in the first place, to determine what is the exact effect of the finding by the jury, which some of the Judges thought was binding upon them to regard the Defendants as acting in the transaction merely as brokers, in the ordinary mode of dealing by persons in that character. Now there

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was evidence at the trial (as already stated from the case upon appeal) that not an unusual mode of business with the Defendants was to purchase cotton upon the chance of its suiting some of their numerous customers; and therefore the finding of the jury, that the cotton in question was bought by the Defendants as agents, in the course of their business as brokers, does not necessarily mean that they bought, according to the ordinary dealings of brokers, for principals, but merely that they bought in their character of brokers, involving in it the proved course of their business, in which they were accustomed to buy as brokers for the purpose not of retaining the goods for themselves, but of keeping them only till they could find a purchaser for them.

At the time when the Defendants purchased the cotton from *Bayley* they had no principals, and therefore if *Micholls, Lucas, & Co.* had not afterwards intervened, the Appellants alone must have been liable; but if once the liability attached, which liability would have been to the true owners of the cotton and not to the fraudulent vendor, the Defendants could only have been discharged by the acceptance by the owners of *Micholls, Lucas, & Co.* as purchasers, which it is unnecessary to add never took place. The Defendants at the time of the sale to them were in the position of agents with an undisclosed principal. *Bayley* knew they were agents, because they promised to send in the name of their principal in the course of the day; but if the Defendants had been sued before they had named a principal they would have had no defence.

The question upon the facts is whether the Defendants were guilty of a conversion. There can be no doubt that the property and legal right of possession of the cotton remained in the Plaintiffs; and *Bayley*, who had fraudulently obtained possession of it, could not give a title to any one to whom he transferred the possession, however ignorant the transferee might be of the means by which *Bayley* acquired it. A great deal of argument was directed to the question, What amounts in law to a conversion? I agree with what was said by Mr. Justice *Brett* in the Court of Exchequer Chamber in this case: "That in all cases where we have to apply legal principles to facts there are found many cases about which there can be no doubt, some being clear for the

Plaintiff and some clear for the Defendant; and that the difficulties arise in doubtful cases on the border line between the two." But to my mind the proposition which fits this case is, that any person who, however innocently, obtains possession of the goods of a person who has been fraudulently deprived of them, and disposes of them, whether for his own benefit or that of any other person, is guilty of a conversion.

The Judges of the Court of Queen's Bench in their judgment in this case thought that it was not distinguishable in principle from *Hardman & Others* v. *Booth* (1). In that case the Plaintiffs were worsted manufacturers near *Manchester*. One of the partners, being in *London*, called at the place of business of a firm of *Gandell & Co.* for orders. At that time the firm, which had been long established and was well known, consisted only of *Thomas Gandell*, whose son *Edward Gandell* was his clerk and managed the business. On inquiring for Messrs. *Gandell* one of the workmen directed the Plaintiff to the counting-house, where he saw *Edward Gandell*, who led him to believe he was one of the firm of *Gandell & Co.*, and under that belief the Plaintiff sent goods to the place of business of *Gandell & Co.*, and invoiced them to *Edward Gandell & Co. Edward Gandell*, who unknown to the Plaintiffs, carried on business with one *Todd*, pledged the goods with the Defendant *Booth* for advances *bonâ fide* made to *Edward Gandell* and *Todd*, and the Defendant afterwards sold the goods under a power of sale. It was held by the Court of Exchequer that the Defendant was liable for a conversion on the ground that there was no contract of sale, inasmuch as the Plaintiffs believed that they were contracting with *Gandell & Co.* and not with *Edward Gandell* personally, and *Gandell & Co.* never authorized *Edward Gandell* to contract for them, consequently no property passed by the sale, and the Defendant, though ignorant of *Gandell* and *Todd's* want of title to the goods, was liable in trover for the amount realized by the sale. I agree with the Court of Queen's Bench that *Hardman* v. *Booth* (1) is not to be distinguished from the present case.

I may also advert to the case of *Stephens* (assignees of *Spencer* and others) v. *Elwall* (2), mentioned by Mr. Justice *Blackburn*, in

(1) 1 H. & C. 803.

(2) 4 M. & S. 259.

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his opinion delivered to your Lordships in this case. There the bankrupts, after their bankruptcy, sold goods to *Deane*, to be paid for by bills on *Heathcote*, for whom *Deane* bought the goods. *Heathcote* was in *America*, and the Defendant *Elwall* was his clerk, and conducted the business of his house in *London*. *Deane* informed the Defendant of the purchase, and the goods being afterwards delivered to him, he sent them to *America* to *Heathcote*. This was held to be a conversion by the Defendant. Lord *Ellenborough* said: "The clerk acted under an unavoidable ignorance, and for his master's benefit, when he sent the goods to his master, but nevertheless his acts may amount to a conversion; for a person is guilty of a conversion who intermeddles with my property and disposes of it, and it is no answer that he acted under the authority of another, who had himself no authority to dispose of it." This case was decided sixty years ago, and I do not find that the authority of it has ever been disputed.

I think that the judgments of the Court of Queen's Bench and of the Exchequer Chamber are right, and ought to be affirmed.

THE LORD CHANCELLOR (Lord *Cairns*):—

My Lords, in this case, having had the advantage of reading beforehand the opinion of my noble and learned friend who has moved the judgment of your Lordships, and agreeing entirely with that opinion, I do not delay your Lordships by any reference to the facts of the case.

It is quite clear that in law the Defendants, at the time when they purchased the thirteen bales of cotton, on the 23rd of December, 1869, had no principals, and must themselves have been liable on the contract; and, although we must take it on the finding of the jury that the cotton was bought by the Defendants as agents in the course of their business as brokers, that is explained by the statement that they were in the habit of making purchases of cotton without any definite instructions, but believing that the cotton would suit certain purchasers, and trusting to them to take it off their hands. There is no doubt that it was according to this course of their business as brokers that the cotton in question was purchased, and that the Defendants bought it in-

tending to request *Micholls & Co.* to adopt the contract; but until an agreement was made between *Micholls & Co.* and the Defendants that the former would take the cotton, the Defendants were the masters of it; they might, on the one hand, have done with the cotton what they pleased, and, on the other hand, if *Micholls & Co.* refused to take the cotton, the Defendants alone would have been liable on the contract.

In this state of circumstances, I agree with what is said by Mr. Justice *Grove,* that the jurors appear to have meant that the Appellants never bought intending to hold or to make a profit, but with a view to pass the goods over to *Micholls & Co.*, or, if *Micholls & Co.* did not accept them, to some other customer, and that therefore in one sense they acted as agents to principals, only intending to receive their commission as brokers, and never thinking of retaining the goods or dealing with them as buyers and sellers. But, as Mr. Justice *Grove* continues, "this would leave the question untouched, whether they did not exercise a volition with respect to the dominion over the goods, and whether, although they intended to act, and did act, in one respect, as brokers, not making a profit by resale, but only getting broker's commission, they did not intend to act and did not act in relation to the sellers, in a character beyond mere intermediates, and not as mere conduit pipes." In my opinion they did act, in relation to the sellers, in a character beyond that of mere agents; they exercised a volition in favour of *Micholls & Co.*, the result of which was that they transferred the dominion over and property in the goods to *Micholls*, in order that *Micholls* might dispose of them as their own; and this, as I think, within all the authorities, amounted to a conversion.

I therefore agree with the motion of my noble and learned friend.

LORD HATHERLEY:—

My Lords, I also agree in the opinion that has been expressed by my noble and learned friends, and I have nothing to add to what has been already said.

It seems to be admitted by everybody, without any dispute

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whatever, that the title of the Plaintiff to the goods in question had not, in itself, been displaced. The real question comes only to be, whether or not there has been a wrongful conversion of those goods by what took place—that is, whether the Defendants in the action, or *Micholls*, who was introduced in the manner described by my noble and learned friend near me (Lord *Chelmsford*), are responsible. That the Defendants bought the goods with the intention of acting as agents for any person who might be willing to take the goods, and to take advantage of the bargain they had made, I have no doubt; and I apprehend that we must look upon the whole of the evidence in this case and the verdict of the jury to ascertain the point I have stated, and that point alone. It is plain from that evidence that at the time the purchase was made by the Defendants from *Bayley*, they had no definite instructions from any one, although they were prepared to act upon the instructions of any client whom the goods might suit; and they found that Mr. *Micholls* was a person whom they would suit. The purchase of the goods by Messrs. *Micholls* not having taken place at the time, or previous to the time, when the arrangement for the purchase was made and completed by *Bayley*, it appears to me that we can only look upon the purchase of the goods as having been made by *Hollins* from *Bayley*, and with the intention, no doubt, of passing on that right to any one who might be willing to accept the goods from them upon the bargain they had made, they being at the same time in such a position that they would have been answerable as upon a *bonâ fide* sale by him, and would have had the goods as their own property until such time as they were taken off their hands by a purchaser.

LORD O'HAGAN:—

The result of your Lordships' consideration of this case will, I fear, inflict hardship upon the Defendants. They are innocent of any actual wrongdoing, but those with whom they are in conflict are as innocent as they, and we can only regard the liability attached to them by the law, without being affected in our judgment by its unpleasant consequences. They appear to me to have been guilty of a conversion in dealing with the Plaintiffs' property,

and disposing of it to other persons, without any right or authority to do so. Confessedly, that property never passed from the Plaintiffs. *Bayley's* fraud vitiated the sale to him, and he could not convey to the Defendants what in no way belonged to himself. They paid for it, and sampled it, and then disposed of it to Mr. *Micholls*, whom they reasonably expected to make the purchase, but who had not made it, and was not bound to make it, when the void sale was effected with *Bayley*, and the Defendants got possession of the Plaintiffs' cotton. They had it conveyed to the railway station and forwarded to the purchaser in *Stockport*, who paid for it and made yarn of it. It seems to me that this state of facts entitles the Plaintiffs to recover in an action of trover, which rests on a right of property, wrongfully interfered with, at the peril of the person interfering with it, and whether the interference be for his own use or that of anybody else.

If the case had been that of a mere broker purchasing for his principal, it would have been, in my mind, much more difficult; for I do not think it plain, with Mr. Baron *Martin*, that it is of no consequence to a right decision whether the Defendants acted in the transaction as principals or agents. In my view of the finding of the jury, which that learned Judge held immaterial, it is not necessary to determine as to the correctness or incorrectness of his opinion in that respect. But for that finding, the facts in evidence appear to me plainly sufficient to remove all difficulty on the score of agency. The Defendants were brokers, and as such had the habit of making purchases, on the expectation that clients would take the goods from them; but in the particular matter with which we have to deal, they purchased for themselves, in their own names and on their own responsibility. They had no principal at the time of the purchase. Mr. *Micholls* did not examine the cotton and make his bargain until some time after it had been completed, and the invoice was headed "Messrs. *Francis Hollins & Co.* Bought from *H. K. Bayley & Co.*" On this state of facts, I agree with the learned Judges of the Court of Queen's Bench, that "this is not the case of a mere broker dealing with goods only in that character," that, although they were actually brokers and intended to make profit in that character, the Defendants bought

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"as their own principals," and that the dealing with *Micholls & Co.* was in fact a re-sale, in which they acted on the assumption that the property had been transferred to themselves by *Bayley*, and conveyed it to a new purchaser in derogation and denial of the Plaintiffs' right. So considered, the case appears to me to be concluded by the authority to which my noble and learned friends have sufficiently referred, viz. *Hardman and Others* v. *Booth* (1).

The real difficulty which embarrasses decision has arisen on the findings of the jury and the form of the reservation by which, properly understood, we are bound to abide. And unquestionably, although that view does not appear to have been pressed in the Court of Queen's Bench, I have felt the force of the objection founded on the findings; and I have doubted whether some of the Judges in the Exchequer Chamber were not right in holding themselves coerced by the verdict to differ from the learned Judges of the Queen's Bench, with whose conclusion they would otherwise have concurred.

But, on consideration, I do not deem the difficulty insurmountable, as I think the findings, in one aspect, quite reconcilable with what seems to me the true inference from the facts. We must take it, as the jury found, that the Defendants acted as brokers or agents in their purchase from *Bayley;* but, as has been observed already, the case shews that the Defendants frequently purchased, not intending to sell for profit on their own account, but taking their chance of finding customers who would adopt the bargain, and being content to accept commission as the only advantage resulting to themselves. In this sense, and according to this usage, they might properly, though perhaps not in perfectly unexceptionable language, be said to have acted as brokers in the dealings before us; but they were not merely brokers, negotiating "only as such," and representing in the ordinary way principals, disclosed or undisclosed, for they had no principals, and had other relations to the goods with which they meddled, and quite other interests than they would have had, if they had been simple negotiators or "mediums of communication between buyer and seller," according to the description of the Lord Chief Baron. They do not

(1) 1 H. & C. 803.

seem to me to have been rightly likened to the carrier or the packer, who is merely such a medium; and the jury may have been warranted in holding that their dealings were, in one sense, conducted by them as brokers, according to their peculiar course of business, and with a view to commission and not to sale, although, in another sense, they had not the purely representative and intermediary character, without regard to personal results or meddling with other men's property, which might have relieved them from the operation of the stringent doctrines of trover and conversion.

I think, therefore, that the appeal should be dismissed; and that the judgments of the Queen's Bench and Exchequer Chamber should be affirmed.

Judgment of the Court of Exchequer Chamber affirmed.

Lords' Journals, 6th July, 1875.

Attorneys for the Plaintiff in Error: *Chester, Urquhart, Bushby, & Mayhew.*

Attorney for the Defendant in Error: *W. W. Wynne.*

On this point of acting as brokers, or in the double and inconsistent character of brokers and principals, see the next case.

1874
July 2, 3.
1875
May 7;
July 6.

CHARLES J. ROBINSON . . . . . APPELLANT;

AND

ROBERT MOLLETT, H. BULL, AND R. H. UNSWORTH . . . . . } RESPONDENTS.

Principal and Agent—Broker—Custom of a particular Market.

CPD.375.
App Cas 483
6 QBD. 346
CPD. 132
5 CPD 207
10 214

A custom in a particular market that a broker who has purchased, and is purchasing, goods of a particular kind, in his own name, may take portions of those goods and supply them to principals who have employed him in his character of broker to buy such goods for them, is one of a peculiar nature, and cannot be supported as against a principal not proved to have been acquainted with it when he gave his order.

Quære, whether it applies at all except as between brokers in that particular market.

The mere fact of employing a broker to execute a commission as a broker, in a market where such a usage prevails, will not make the principal liable under it.

The rule that a usage which really changes the character of the broker and the nature of the dealing is one which cannot be supported—approved of.

R., a merchant in *Liverpool*, gave orders to a tallow broker in *London* to buy certain quantities of tallow for him. The broker did not buy the specified quantities from any person, though he sent bought notes in the usual form, "Bought of *A.* on your account," but, both before and after the order, he bought from various persons, in his own name, larger quantities of tallow, proposing to allot to *R.* the quantities *R.* had desired to be bought. On *R.'s* refusal to accept, the broker sold the tallow, and brought an action for the differences:—

Held, that, though the evidence shewed such a mode of dealing to be the usage in the *London* tallow market, the action was not maintainable against a principal who did not appear to have had knowledge of its existence.

THIS was an appeal against a judgment given in the Court of Common Pleas for the Plaintiffs (now the Respondents) on a Case stated, which judgment, through an equal division of opinion among the Judges in the Exchequer Chamber, had stood affirmed.

Robinson was a merchant at *Liverpool; Mollett, Bull, & Unsworth* were tallow brokers in *London*. On the 2nd of April, 1869, *Unsworth* was in *Liverpool* and saw *Robinson*, who then gave him an order to purchase for him (*Robinson*) 50 tons of tallow at 46*s.* 6*d.* On the 29th of April *Robinson* sent up from *Liverpool* an order to *Mollett & Co.* to purchase for him 200 tons of tallow

(100 tons for himself, 100 tons for a friend), to book the whole to him, and to make the purchase (not at a specified price, but) on the "best terms." The two orders were for the June delivery.

Mollett & Co. had before bought, and did afterwards buy, from various persons considerable quantities of tallow, none specifically for *Robinson*, but proposed to supply the whole 250 tons, at the June delivery, out of their various purchases. In their bought notes, sent immediately after each of *Robinson's* orders had been given, *Mollett & Co.* said, "We have this day bought for your account," and signed these notes with the addition of the words, "*Mollett, Bull, & Unsworth*, sworn brokers." The price of tallow fell in the market between the dates of the orders and the time for the June delivery. When that time arrived, *Mollett & Co.* tendered 250 tons of tallow, but *Robinson* refused to accept the tallow so tendered. *Mollett & Co.* sold the tallow, and then brought assumpsit to recover the difference, which amounted to £362, insisting that they were entitled to do so in virtue of the established usage of the *London* tallow market.

The first count of the declaration alleged that the Defendant employed the Plaintiffs as his agents and brokers to purchase the tallow, and undertook to accept and pay for the tallow according to the contract, and would indemnify the Plaintiffs against liability or loss they might sustain by having made the contract for the Defendant; that the Plaintiffs did in pursuance of the said employment, and upon the terms thereof, purchase the tallow. Averment of performance of all the conditions. Breach, that the Defendant refused to accept, whereby Plaintiffs sustained damage by reason of the price of tallow having fallen, &c., and Defendant refused to indemnify the Plaintiffs.

The second count alleged an agreement between the Plaintiffs and the Defendant, that the Plaintiffs should sell to him, and that he should buy and accept from them, the tallow, &c., and stated the sale by the Plaintiffs to the Defendant, and the refusal to accept; and then there were a count for goods bargained and sold and the money counts.

The Defendant traversed all the allegations in the first and second counts, and then pleaded exoneration, and discharge, never indebted, payment, and set-off. Issue thereon.

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The cause was tried before Lord Chief Justice *Bovill* at the *London* sittings after Michaelmas, 1869, when it appeared that the Plaintiffs and Defendant had had several dealings together on former occasions; that the course which the Plaintiffs had pursued on this occasion (though the Defendant was not shewn to have known the fact,) was that which they had ordinarily pursued in their dealings; that in these cases the principals' names were not disclosed on either side; and that by these notes the Plaintiffs became bound personally to the sellers for the fulfilment of the contracts.

The 14th paragraph of the Case stated that "settlements of transactions in tallow are usually made in *London* in the months of April, May, and June respectively, and on the May settlement Messrs. *Simpson & Co.*, persons from whom the Plaintiffs had bought some of the tallow intended to be supplied to the Defendant, failed, and were unable to meet their engagements. Thereupon the Plaintiffs and *Simpson & Co.* having many transactions together outstanding in respect of the sale and purchase of tallow, balanced and settled an account thereof, wherein the quantity of tallow sold was set off against the quantity of tallow purchased by the Plaintiffs on account of *Simpson & Co.*, whereby it appeared that the Plaintiffs had sold between 100 and 200 tons more than they had purchased on that account."

The Defendant admitted that the tallow tendered was in accordance with the contracts.

The 29th paragraph of the Case was in these terms: "At the trial it was proved that there exists an established custom in the *London* tallow trade for brokers, when they receive an order from a principal for the purchase of tallow, to make a contract or contracts in their own names without disclosing their principals, and also to make such contracts either for the specific quantity of tallow so ordered, or to include such order with others they may have received in a contract for the entire quantity, or in any quantities at their convenience, at the same time exchanging bought and sold notes with the selling brokers as above described in the present case, and passing to their principals a bought note for the specific quantity ordered by them, as before described in this case, and that when a broker so purchases in his own name

he is personally bound by the contract, and that on the usual settling-days the brokers balance between themselves the purchases and sales so made, and make or receive deliveries to or from their principals, as the case may be, or if their principals refuse to accept or deliver, then to sell or buy against them, as the case may be, and charge them with the loss, if any, or if delivery is not required on either side, then any difference which may arise from a rise or fall in the market is paid by the one to the other. This custom does not exist at *Liverpool*, and was unknown to the Defendant. The whole of the transactions and dealings in the present case were carried out in accordance with this custom."

A verdict was taken for the Plaintiffs for £362, subject to leave reserved to enter a nonsuit. The case was afterwards argued, and the Judges differed in opinion, Lord Chief Justice *Bovill* and Mr. Justice *Montague Smith* being of opinion that the Plaintiffs were entitled to have the verdict entered for them, and Mr. Justice *Willes* and Mr. Justice *Keating* being of opinion that a nonsuit ought to be entered (1). On appeal, the Judges in the Exchequer Chamber were also equally divided in opinion (2), and so the judgment of the Court below stood affirmed. This appeal was then brought.

The Judges were summoned, and Mr. Justice *Blackburn*, Mr. Justice *Mellor*, Mr. Justice *Brett*, Mr. Baron *Cleasby*, Mr. Justice *Grove*, and Mr. Baron *Amphlett* attended.

Mr. *Cohen*, Q.C. (Mr. *C. P. Butt*, Q.C., and Mr. *H. Davidson* were with him), for the Appellant *Robinson*:—

It is not admitted that *Robinson*, a merchant of *Liverpool*, who was entirely ignorant of the supposed usage in the tallow market of *London*, would be bound by that usage, even if it was one of a restricted kind; but here the usage set up is something more—it affects not merely the mode in which the contract is to be carried into effect and the mere "incidents of that contract"—an expression pointedly used in many of the decided cases—but

(1) Law Rep. 5 C. P. 646.
(2) Law Rep. 7 C. P. 84. In this, and in the preceding report, the pleadings and the facts are fully detailed.

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it pretends to change the whole nature and substance of the contract itself. *Robinson* employed *Mollett & Co.* as his brokers; they accepted the employment as brokers; they described themselves in the bought notes as having bought for and "on account" of *Robinson*, and as being "sworn brokers" of the city of *London;* but in this action they affected to treat themselves as principals in the transactions, and to claim payment of differences as if they had been the owners of the tallow, and had sold it to him.

Their bought notes represented them as having bought of other persons "for your account"; in fact they had not done so on account of the Defendant, and no third person was liable to the Defendant on any supposed contract. The Plaintiffs had acted in this way, on the ground of a supposed custom or usage of the tallow trade in *London*, of which *Robinson* was ignorant, and which absolutely changed the relations of the parties and the nature of their dealings. A broker is a person invested with certain known rights and privileges; but he is also subject to certain restrictions in the performance of his duties. One of those duties is to do the best for his principal. Convert him into a principal, which this supposed usage in the tallow market proposed to do, and he then assumes a different character, and he becomes no longer the agent of his principal, doing the best for that principal—using his skill and experience for the profit of that principal—but a rival in trade, doing the best he can for himself. *Story* says (1) that "a broker is a mere negotiator between other parties." No matter, therefore, whether such a usage had or had not found its way into the tallow market of *London;* it was one which was opposed to all principles of law and could not be sustained. And all the cases which had been decided on this matter, and might perhaps be cited on the other side, only amounted to this, that a person dealing in a particular market, where there were particular settled usages, would have his dealings affected by those usages where such usages related only to the mode of executing the contract, the allowance of certain discounts, the payment within certain times, or matters of that sort; but there were no cases whatever which warranted the claim to change the relation

(1) Agency, § 28.

between broker and principal, and in that way to change the very nature of the contract itself. The power to make such a change would not only affect the relations of agent and principal, but throw into confusion the rights and liabilities of all the parties who had dealt with them: *Wigglesworth* v. *Dallison* (1); *Brown* v. *Byrne* (2); *Grissell* v. *Bristowe* (3); *Humfrey* v. *Dale* (4).

Mr. *Benjamin*, Q.C., and Mr. *Watkin Williams*, Q.C., for the Defendants in Error:—

There can be no doubt of the usefulness as well as validity of usages introduced into particular trades by men who are engaged in those trades, and if those usages are not contrary to the principles of law the Courts will recognise them. The usage here set up is not contrary to any principles of law, and it is one which the habits and experience of persons engaged in the tallow trade have adopted as beneficial. Here the Defendant gave a general order, in the first instance, to one of the Plaintiffs; the order was to be executed in the *London* tallow market; it was, therefore, to be executed subject to the usages of that market. In the second instance he himself sent up the order to *London*. In neither case did he impose any restrictions or make any special reservations in his own favour. He gave orders to be executed in a particular market, and was, therefore, bound by its established usages. In the first case he named the price, 46*s*. 6*d*.; in the other he stipulated only for the "best terms." He did nothing more. Of course the Plaintiffs could not exceed the 46*s*. 6*d*., and were bound to buy as low as they could on the other order; they have done so, for their bought note stated a sum below the 46*s*. 6*d*., namely 43*s*. 3*d*. They literally complied with the orders they had received. If the contracts themselves had specified "according to the usages of the *London* market," those usages could not have been more effectually introduced than they were here. If the Defendant knew these usages he was bound by them; if he did not know of them he must be treated as content to submit to those which might exist in the market where he chose to deal. And he had no excuse, in

(1) 1 Sm. L. C. 453, 4th Ed. and the notes.
(2) 3 El. & Bl. 703.
(3) Law Rep. 4 C. P. 36.
(4) 7 El. & Bl. 266; El. Bl. & El. 1004.

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point of fact, as to want of knowledge, for he had on several previous occasions had dealings through the Plaintiffs' house with the *London* tallow market. If he wanted to deal in a manner different from these recognised usages he was bound to make that known: he did nothing of the kind. Yet he must have been aware that there were particular usages in particular trades in certain markets, for in the *Liverpool* wool market there was a usage that a broker might contract in the name of his principal, or withhold the name of his principal, and so make himself personally liable, a usage which the Court of Common Pleas have declared to be good: *Cropper* v. *Cook* (1). There Mr. Justice *Willes* spoke of that as a question of authority, yet he said (2) that "the fact of authority is supplied by proving that the contract was made in a market where it is usual for the agents to contract in that manner, and the principals knowing of the existence of the custom, or not choosing to inquire about it, must be bound by it." That principle must govern the present case. There could be no doubt that if the Defendant had sent his orders to *New York*, or any other foreign port, he would have been held bound by the custom of that port. In a case like the present, though the person receiving the order to buy was called a broker, he was, in truth, something more; he was a commission merchant, having to buy not a settled article at a settled price for instant delivery, but he had to buy on the best terms for future delivery. He was, therefore, compelled, by the usage of the market and the necessity of the case (3), to take the transfer to himself in order to be able to hand over the thing purchased to the person who wanted it at the time when that person required it to be delivered.

Trueman v. *Loder* (4), *Favenc* v. *Bennett* (5), *Sutton* v. *Tatham* (6), *Taylor* v. *Stray* (7), and *Bayliffe* v. *Butterworth* (8) were referred to and commented on.

Mr. *Cohen* replied.

(1) Law Rep. 3 C. P. 194.
(2) Ibid. 200.
(3) See *Ireland* v. *Livingstone*, Law Rep. 5 H. L. 395.
(4) 11 Ad. & El. 589.
(5) 11 East, 36.
(6) 10 Ad. & El. 27.
(7) 2 C. B. (N.S.) 175; 26 L. J. (C.P.) 185.
(8) 1 Ex. 425.

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THE LORD CHANCELLOR proposed the following question to the Judges:—

Whether the judgments of the Courts of Common Pleas and Exchequer Chamber were right?

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May 7.

MR. JUSTICE BLACKBURN.

MR. JUSTICE BLACKBURN:—

My Lords, in answer to your Lordships' question, I say that in my opinion the judgments of the Courts of Common Pleas and Exchequer Chamber are right.

The Plaintiff seeks to recover in consequence of his having incurred liability from executing (in the manner stated in the Case) two orders to purchase tallow for the Defendant, one being an order to purchase 50 tons given on the 2nd of April, 1869, the other being an order to purchase 200 tons given on the 28th of April, 1869. The whole of these 250 tons were to be purchased for the June delivery.

At the time when the first order for 50 tons was executed the Plaintiff made a contract with *W. Simpson & Co.* for 150 tons, intending to appropriate 50 out of that to the Defendant's order for 50 tons.

At the time when the second order for 200 tons was executed the Plaintiffs made two contracts, one for 150 tons with *W. Simpson & Co.*, and one with *Rayner* for 200 tons, intending to appropriate the 150 tons and 50 out of *Rayner's* contract to the Defendant's order for 200 tons.

I think that this mode of executing the orders was a departure from the ordinary duty of a broker (that duty requiring the broker to establish privity of contract between the two principals); but the custom (if incorporated in the order and valid in law) dispenses with the necessity of establishing privity of contract, though it leaves the rest of the broker's duties in full force. There are two questions of law to be discussed:—First, Is the custom (if incorporated in the order) invalid in point of law? Second, Is it incorporated in the order?

As to the first, I can see nothing to render such a custom (if incorporated in the order) invalid in point of law.

Any person, if he chooses, may give an order to an agent to buy

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as his agent, not only with an express dispensation from any obligation to establish privity of contract between him and the person from whom the agent buys, but even expressly refusing authority to the agent to establish such privity.

This is the ordinary authority given to a foreign commission merchant, who (on account of the great inconvenience which would result from establishing privity of contract between the foreign producer and the home merchant) is not allowed (far less required) to establish privity of contract between them: *Hutton* v. *Bulloch* (1). This, however, in no way interferes with the existence of a fiduciary relation, or the consequent obligation on the agent not to put his own interest in conflict with that of his principals. I cannot, therefore, see that there is anything in the custom proved in this case, so far as it dispenses with establishing privity of contract between the person giving the order and the ultimate vendor, which is wrong, so as to make the custom void, as against policy, or inconsistent with the fundamental principles of right and wrong.

It is suggested that it exposes the agent to a great temptation to sell his own goods instead of buying in the market. If the agent so did he would, according to the decision of your Lordships' House in *Rothschild* v. *Brookman* (2), be bound if the bargain was such as his constituent approved of, whilst the constituent would be free if he chose to set it aside, which seems a very sufficient guard against such a consequence. In practice no such consequence as is suggested does arise. Commission agents and brokers in the tallow trade, either from regard to their character, or from dread of the consequences, do in general make contracts with others, and do not sell their own goods, and the Plaintiffs in the case at bar have made contracts with others, as they were bound to do.

Had the order in the present case expressed that it was to buy according to the custom of the tallow market, there can, I think, be no question that the custom would have been incorporated, and that all that the Plaintiffs did would have been in strict conformity with the authority given. And then I think that the Plaintiffs

(1) Law Rep. 9 Q. B. 572. (2) 2 Dow & Cl. 188.

having incurred liability at the Defendant's request, and having been obliged to pay money in consequence, would be entitled to an indemnity from the Defendant: *Kellock* v. *Enthoven* (1). My Brother *Brett* seems to express an opinion that the Plaintiffs would not be entitled to an indemnity for the loss they incurred in consequence of having, at the Defendant's request, bought tallow on their own credit, and being obliged to take and pay for that tallow at a time when prices had fallen, unless they were in a position to maintain an action against the Defendants for not accepting goods sold to them by the Plaintiffs. I know of no authority for this. It seems to me to be in conflict with the numerous cases in which the broker on the *Stock Exchange* recovers from his client money paid, though he could not maintain any action for shares sold. I cannot see why the Plaintiffs may not sell the tallow and sue for the loss as money paid. Of course, if the Defendant had been willing to take and pay for the tallow the Plaintiffs could have had no claim.

But though this is so, the second question remains, whether the custom is incorporated in the orders. And this, I think, is a question of great difficulty. The orders are in writing, and by the general rule of the law of evidence, the writing is conclusive as to the terms of the authority, and what is not in the writing cannot be part of the terms. To this there is an exception, that customs of trade are tacitly incorporated in the contract, though not expressed in it, provided the express terms of the writing are not so inconsistent with the custom as to exclude it.

On the application of this proviso to the present case, there has been a great difference of opinion. In the judgment delivered by me in the Exchequer Chamber, I gave at length my reasons for answering it in favour of the Plaintiffs. Nothing new has occurred to me since I wrote these reasons, and I beg respectfully to refer your Lordships to the printed judgment, instead of repeating them now.

But there is a new point on which I must make some observations.

In the judgments below, and as I thought in all the arguments below, the question as to the whole of the 250 tons was treated as

(1) Law Rep. 9 Q. B. 241.

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being identically the same, though *Rayner* remained solvent and *W. Simpson* had failed.

But if I understand Mr. *Cohen's* argument at your Lordships' Bar rightly, he contended that even if the Plaintiffs were entitled to recover in respect of the 50 tons on the contract made with *Rayner* who continued solvent, they were not entitled to recover anything in respect of the 200 tons which were appropriated out of contracts made with *W. Simpson & Co.*, who failed before the time for the delivery in June. If your Lordships should agree with the judgments below, that the Plaintiffs are entitled to recover at all, this special ground could only go to reduce the damages. I do not think it is raised on the facts stated in the case; and I do not think it would be good in law if the facts were such as to raise it.

If I understand the argument rightly, it was contended that the meaning of the 14th and 29th paragraphs of the case taken together was, that on the failure of *W. Simpson & Co.* in May, the whole of the contracts made between him and the Plaintiffs, including those contracts which were made for the June delivery, and which were therefore not yet ripe, were settled for according to the May market prices.

I need hardly point out to your Lordships that if any point was really intended to be made on this, it ought to have been stated whether prices did remain the same, or rise or fall, and if so how much, and what difference, if any, it made.

I certainly understood, and still understand, the statements in the case to mean that the periodical settlements were made in May as to contracts for delivery in May, and the June settlements as to contracts for delivery in June. And that, though on the failure of *W. Simpson & Co.* becoming known in May, it was known that the June contracts would not be fulfilled by him, and therefore that these contracts were, as is usual, to be set against each other, and probably against any contract made to carry over the balance of the May contracts to June, yet the prices at which they were to be settled would depend on the June prices.

However, even if the case is to be construed as contended, I do not think it affects the result.

It was certainly improbable that the June price should be precisely the same as the May price. If prices fell, I agree that the Plaintiffs could not charge the Defendant with the difference between what was paid in May and what would have to be paid if they had waited till June, but they have not tried to do so. If prices rose, I think that the Defendant could have claimed an allowance when estimating the damages in this action for any profit made by the Plaintiffs in consequence of the settlement at the May prices, if any profit there was; indeed I see no reason why he should not now, by an independent suit, call upon the Plaintiffs to account for the profits if any there were; but no such claim has been made in any way.

The Defendant's position, therefore, as regards this point must be, that though the Plaintiffs have discharged the liability which, at the Defendant's request, they incurred, in order to procure the tallow for him, and though the Defendant may have all the tallow he had ordered through the Plaintiffs, yet because the mode in which the Plaintiffs discharged their liability is one which might, by possibility, have given rise to a claim for an allowance, perhaps not even nominal, the legal result is to work a forfeiture of their whole claim, however large.

This would be very rude jurisprudence. I do not deny that in *Cooper* v. *Davidson* (1) the judgment of the Exchequer Chamber was that the plea to an action on a guarantie under hand for a large sum, that whilst the guarantie was in the custody of the Plaintiffs, a person unknown had affixed seals beside the signature of the Defendants and so made the guarantie purport to be under seal, was a good plea.

That decision proceeded on the authority of *Pigot's Case* (2), and Lord *Denman* in delivering judgment says the rule may be explained on the ground that the Plaintiff, having the custody of the document was bound to preserve it in its original state; and that his having failed to do so might put the Defendants to some expense and inconvenience. He does not allude to the disproportion between the damage thus done, which might be very small, and the forfeiture of all claim under the instrument, which might

(1) 13 M. & W. 343.
(2) 11 Co. Rep. 26, 27.

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be very large; though in the particular case before the Court the facts were such as to bring this forward prominently. The act was the unauthorized act of a clerk who, foolishly but *bonâ fide*, had thought that wafers were intended to be put on the instrument; an act which could not really have put the Defendants to much cost, and the sum forfeited was £1500.

And in *Samuell* v. *Howorth* (1), Lord *Eldon* explains the well-established doctrine, that giving time to the principal debtor discharges the surety, on the ground that though the giving time might do the surety no harm, or even be for his benefit, he says: "The law has said that the surety shall be the judge of that, and that he alone has the right to determine whether it is or is not for his benefit. The creditor has no right, it is against the faith of his contract, to give time to the principal, even though manifestly for the benefit of the surety, without the consent of the surety."

These are certainly high authorities for saying that rules, which are now established, were originally framed on a principle which would give colour to the point now contended for.

But I think that these must be considered as exceptional cases. I think that at all events since the publication of the well-known note of Serjeant *Williams* to *Pordage* v. *Cole* (2), it has been the general rule of law that in all cases of contract (and this is a case of contract) where the Plaintiff has broken the contract in some particular, and the breach of contract on the Plaintiff's side goes only to part of the considerations, and may be paid for in damages; it is matter for a cross action or an allowance, and does not bar the Plaintiff altogether (3). The numerous cases which in my opinion establish this as the general rule at law, at least, are to be found collected in Sir *E. V. Williams*' notes to *Pordage* v. *Cole* (4), and the notes to *Cutter* v. *Powell* (5).

It is not necessary, if my view of the construction of the case is right, for your Lordships to decide any question of law on this, but I think it right to submit my view on it for your Lordships' consideration.

(1) 3 Mer. 272.
(2) 1 Wms. Saund. 319, n.
(3) See, on this matter, *Roberts* v. *Brett*, 11 H. L. C. 337.
(4) 1 Wm. Saund. last Ed. p. 552.
(5) 2 Sm. L. C. pp. 1–9.

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MR. JUSTICE MELLOR.

MR. JUSTICE MELLOR:—

The farther consideration of this case, and the argument addressed to your Lordships by the learned counsel at the Bar, have failed to convince me that the opinion which I expressed in the Court of Exchequer Chamber (1) is erroneous.

Indeed, I feel more strongly than I there expressed myself, as to the mischievous consequences likely to result from permitting evidence of usages to be admitted beyond the limit already prescribed by decided cases, and I have always understood that limit to be, that such evidence is admissible only to explain mercantile expressions and to add incidents, or to annex usual terms and conditions which are not inconsistent with the written terms between the parties (2), and that it cannot be admitted to convert a broker employed to buy for his employer, into a principal to sell to him, unless in cases where the person employing the broker knows and assents to the dealing on the footing of such custom. The custom with regard to the mode of buying and selling is described in the Case, and I submit with deference to your Lordships' consideration that it would be difficult to conceive any practice or custom of a market so opposed to the well-understood character and authority of a broker. In the language of my Brother *Hannen*, in the Court below (3): "It appears to me to amount to a custom for a broker in the tallow trade in *London*, to do something entirely inconsistent with the character of a broker, viz., to convert himself, from an agent to buy for his employer, into a principal to sell to him."

In the present case, the mode in which the contract is said to have been performed was not by purchasing 50 tons of tallow on account of the Appellant, or actually appropriating to him 50 tons from the larger purchase made by the Respondents from *Simpson & Co.* as stated in the case, but, in fact, the Respondents did no more than form an intention to appropriate 50 tons out of the 150 tons so purchased by them from *Simpson & Co.*, but which, according to the usage set out, would, as stated by my Brother

(1) Law Rep. 7 C. P. 99.
(2) *Brown* v. *Byrne*, 3 El. & Bl. 703–715; *Humfrey* v. *Dale*, 7 El. & Bl. 266, 274.
(3) Law Rep. 7 C. P. 98.

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Cleasby (1), "only form an item in the tallow account between *Simpson & Co.* and the Plaintiff."

By this course of dealing the Defendants would lose the responsibility of any other "principal" than his "broker."

It is said by *Willes*, J., in his judgment in the Court of Common Pleas (2), that "it is an axiom of the law of principal and agent that a broker employed to sell cannot himself become the buyer, nor can a broker employed to buy become himself the seller, without distinct notice to the principal, so that the latter may object if he think proper; a different rule would give the broker an interest against his duty."

I agree in this, and think that although a custom of trade may control the mode of performance of a contract, it cannot change its intrinsic character.

My experience as a judge convinces me of the necessity of keeping within strict limits the shifting, varying, and constantly expanding usages, by which it is sought to change or affect the written terms of contracts of this description.

A person who authorizes a broker to buy in a market, the usages of which are not known to him, may reasonably expect to find that the mode of dealing in that market may not be in all respects such as he would anticipate, but he can hardly be supposed to contemplate that the universal acceptance of the nature and dealing of a broker to buy for him will be converted into a principal to sell to him.

As the usage in question appears to me wholly inconsistent with the written terms between the parties, I answer your Lordships' question by saying that in my opinion the judgments of the Courts of Common Pleas and Exchequer were not right and ought to be reversed.

MR. JUSTICE BRETT:—

I agree that no mere question of legal technicality is raised in this case. It seems to me that a very large question is opened, which is, what is the proper measure or limit of the control of mercantile customs by the law. That the course of mercantile

(1) Law Rep. 7 C. P. 95. (2) Law Rep. 5 C. P. 655.

business should be left to be as free as possible seems to me to be beyond doubt. That it is subject to some control is equally undoubted. It is when merchants dispute about their own rules that they invoke the law. The Courts, therefore, being appealed to have been obliged to apply some rule. When merchants have disputed as to what the governing rule should be, the Courts have applied to the mercantile business brought before them what have been called legal principles, which have almost always been the fundamental ethical rules of right and wrong. They have decided in favour of that course of business which was in accordance with such principles or rules, and against that course which was inconsistent with them. Thus, for example, when shipowners and underwriters disputed upon the effect of concealment of certain facts, the Courts, finding that the contract of maritime insurance must be one of confidence, because the knowledge of many material facts must of necessity be confined to the shipowner, applied the principle of *uberrima fides*, and laid down the rule that if a material fact known to the assured and unknown to the underwriter be not communicated to the latter at the time of the making of the contract it shall be ineffective. But when once rules are laid down, they must at some time become irksome to some individual or to some body of men. And there must from time to time be some contention raised, or some course of business invented, which is alleged to be an attempt to break through them. The Courts are then again appealed to. Customs of trade, as distinguished from other customs, are generally courses of business invented or relied upon in order to modify or evade some application which has been laid down by the Courts, of some rule of law to business, and which application has seemed irksome to some merchants. And when some such course of business is proved to exist in fact, and the binding effect of it is disputed, the question of law seems to be, whether it is in accordance with fundamental principles of right and wrong. A mercantile custom is hardly ever invoked but when one of the parties to the dispute has not, in fact, had his attention called to the course of business to be enforced by it; for if his attention had in fact been called to such course of business, his contract would be specifically made in accordance with it, and no proof of it as a custom would be neces-

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sary. A stranger to a locality, or trade, or market, is not held to be bound by the custom of such locality, trade, or market, because he knows the custom, but because he has elected to enter into transactions in a locality, trade, or market wherein all who are not strangers do know and act upon such custom. When considerable numbers of men of business carry on one side of a particular business, they are apt to set up a custom which acts very much in favour of their side of the business. So long as they do not infringe some fundamental principle of right and wrong, they may establish such a custom; but if, on dispute before a legal forum, it is found that they are endeavouring to enforce some rule of conduct which is so entirely in favour of their side that it is fundamentally unjust to the other side, the Courts have always determined that such a custom, if sought to be enforced against a person in fact ignorant of it, is unreasonable, contrary to law, and void. An example has lately been before your Lordships in an alleged custom on the *Stock Exchange* (1). The question, therefore, I submit, in the present case is, whether the alleged custom is not too much in favour of the brokers who set it up, whether it does not pass beyond due freedom and degenerate into injustice. If the custom which exists in fact is not unjust, as against principals ignorant of it, your Lordships will uphold it, however much it departs from the rules hitherto recognised by the Courts as applicable to the contract of employment between principals and brokers, but if it so far breaks from those rules as to be unjust to such principals in such contract, your Lordships will pronounce it to be void as a custom. One form of stating this proposition of injustice is to say, as *Willes*, J., said in the Court of Common Pleas in this case, "It is an elementary proposition that a custom of trade may control the mode of performance of a contract, but cannot change its intrinsic character." This is true, I apprehend, because it would be manifestly unjust to allow one party to a contract to change without the consent of the other, the very substance of the contract, or any essential part of it, to which they had actually specifically agreed. And thus *Blackburn*, J., in the Exchequer Chamber says, in what I venture to think are equivalent terms, "To some extent I agree with this"

(1) *Nickalls* v. *Merry*, *ante*, p. 530.

—that is, with the proposition enunciated by *Willes*, J.—"if the terms are such as to be inconsistent with the nature of the employment, so that if they prevailed they would change its nature altogether, I think they should be rejected." The question, therefore, may be thus stated:—Is the custom relied on so inconsistent with the nature of the contract to which it is sought to be applied as that it would change its nature altogether, or as to change its intrinsic character. If it would, it is unjust as against the Defendants, and therefore it is void; if it would not, it should be allowed to prevail.

Now the contract to which it is sought to apply the custom is the contract of employment between the Plaintiffs and the Defendant. That contract was instituted by the two orders of the Defendant of the 2nd and 28th of April, the specific terms of which are given. They are orders given by a merchant, intending to be a buyer of tallow, to persons carrying on the known trade of brokers. The terms of the first order, given on the 2nd of April, are "to buy for him 50 tons of tallow, June delivery, at 46*s*. 6*d*." The terms of the second order, given on the 28th of April, are, "Buy 200 tons tallow for June, best terms." The relation between the Plaintiffs and the Defendant, established by these orders of the Defendant and their acceptance by the Plaintiffs, was that of principal and agent, a merchant principal, a broker agent. Brokers, in some cases, are bound to have and to exercise a knowledge of the quality, condition, and value of goods; in others they are bound only to exercise care and diligence in finding a party to contract. In the present case the orders are to buy, in April, in a market, tallow to be delivered in June. In such a case there is no tallow to be examined in April. All that can be done in April is to make a contract. The words "to buy" in these orders therefore mean, by necessary construction, "to make a contract for the purchase of." And the orders are to buy "for the Defendant;" so that they are, specifically, by necessary construction, orders "to make for the Defendant a contract for the purchase of tallow." If such a contract cannot be obtained within the limits given by the orders, the Plaintiffs can do nothing. They cannot bind the Defendant, or earn commission for themselves. If such a contract can be obtained within the limits, the

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one thing which the Plaintiffs are directed by the specific terms of the order to do, and which therefore they undertake to do, is to make a contract "for the Defendant" for the purchase of tallow. To make such a contract "for the Defendant" is to make a contract for the purchase of tallow, to which the Defendant is to be one party and a person or firm found by the Plaintiffs is to be the other party. If this is not what they have to do, they have nothing to do. The making of such a contract is therefore, as it seems to me, the very essence of their contract with the Defendant, which is a contract of employment. If the custom, when applied, would enable the Plaintiffs to earn their commission without making such a contract, it would do away with the one thing they were employed to do, it would do away with the essence of their contract, it would therefore, as it seems to me, change the intrinsic character of their contract of employment, it would change the nature of their employment altogether.

The Plaintiffs have acted in all things according to the custom. What the custom would enable them to do can therefore best be seen by examining what they have done. It is admitted on all hands that the contracts made with *W. W. Simpson & Co.* on the 2nd of April, and with *Rayner & Co.* and *Simpson & Co.* on the 28th of April, were not contracts between any of those firms and the Defendant. The difference between the quantity of tallow mentioned in them and in the orders of the Defendant prevents them from being contracts with the Defendant. None of those firms could have sued the Defendant for not accepting 50 tons or 200 tons of tallow; nor could the Defendant have sued any of them for non-delivery of 50 or 200 tons of tallow. It is equally clear, then, that the bought notes of the 2nd and 28th of April, sent by the Plaintiffs to the Defendant, were no memoranda of contracts in fact made between the Defendant and undisclosed principals. It may be true, and I incline to think it is, that inasmuch as the Plaintiffs had, in fact, procured no principals to any such contracts made for the Defendant, as those notes represent to have been made for him, the Defendant might have, if circumstances had rendered it profitable, elected to sue the Plaintiffs as upon a contract by themselves to deliver tallow to him in June at the prices mentioned in those notes. But the Plaintiffs could

never have successfully sued the Defendant for not accepting or paying for tallow, as upon contracts of purchase and sale made with them as principals, by virtue of those bought notes. The Defendant, therefore, has no one liable by contract to him for the delivery of tallow, unless at his election it be the Plaintiffs; he is not liable to any one by virtue of any contract of purchase and sale to which he is a party, to accept or pay for any tallow, the Plaintiffs have not made any contract for the purchase of tallow to which the Defendant is one party and a person or firm found by the Plaintiffs is another party. For non-delivery of tallow, if such delivery had been profitable to him, the Defendant would have had no one to sue, unless the Plaintiffs. And, as has been pointed out in the judgments below, he might have been unwilling to rely on their sole responsibility. It has been suggested that the Plaintiffs undertook, and intended to undertake, the liability of *del credere* agents. I doubt whether they ever intended so to do. A commission of a half per cent. is no *del credere* commission. Those who put forward this custom would, if sued as *del credere* agents for a non-delivery, have strongly denied that liability; and with effect, for such a liability is one as on a guarantie, and implies the existence of a principal contract, and a previous failure by the principal to that contract. The Plaintiffs therefore have not done that only thing which their specific contract with the Defendant obliged them to do, they have not made a contract of purchase and sale to which he is a party, and to which, as bound to him, some person or firm found by the Plaintiffs is the other party. But then it is suggested that, although the Defendant has no one whom he could in case of need sue with success for non-delivery of tallow, unless it be the Plaintiffs; and although he need only by virtue of his own election, in case of necessity, sue them as upon a contract for non-delivery; and although no one, not even the Plaintiffs, can sue him for not accepting tallow; yet, by virtue of the custom, if the Plaintiffs suffer a loss by reason of having entered into a contract themselves to accept or pay for tallow, he is bound to make good such loss to the Plaintiffs. It is said that the custom authorizes the Plaintiffs to make contracts for the purchase of tallow to which the Defendant is no party, but in which they themselves are pur-

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chasers and principals. But if it stop there, how can the Defendant be made liable? He cannot be liable unless upon failure to do something which he is bound to do. What is the thing which it is suggested he failed to do, unless it be that he failed to accept the tallow? The order then must be taken to incorporate farther an undertaking by the Defendant to accept, from the Plaintiffs, tallow delivered to them under their contracts of purchase, or to indemnify them against any loss by reason of his not so accepting such tallow. The legal amplification then of the contract between the Plaintiffs and the Defendant would be "In consideration of your contracting to purchase, as principals, tallow in April for June delivery, and of your offering to deliver it to me in June at the price at which you bought it in April, I promise to accept it in June and to pay for it, and to pay you a half per cent. commission for making a contract." Such a contract to accept tallow to be offered by the Plaintiffs is, in my opinion, substantially a contract of sale by the Plaintiffs to the Defendant, and of purchase by the Defendant from the Plaintiffs. If so, it is inconsistent with the nature of the Plaintiffs' employment; and the intrinsic character of their original contract is altered. If there is no contract of purchase and sale between the Plaintiffs and the Defendant I fail to see any liability on the part of the Defendant to accept tallow, or any liability to do anything for the failure of doing which he ought to indemnify the Plaintiffs. And whatever view may be taken of the effect of the custom, if allowed, it must go to the extent either of making a contract of purchase and sale between the Plaintiffs and the Defendant, or of absolving the Plaintiffs from the obligation to make a contract for the Defendant, that is to say, to make a contract for the purchase of tallow to which he should be a party as purchaser and some person or firm found by the Plaintiffs should be a party as seller. In the former view, the relation constituted by the custom is admitted to be inconsistent with the relation constituted by the original contract between the Plaintiffs and the Defendant; in the second, it seems to me to be equally inconsistent, because it absolves the Plaintiffs from the obligation to do the only thing which the original contract bound them to do. It follows that I cannot adhere to the judgment of *Bovill*, C.J., in the Court of Common

Pleas; for he concluded that the ultimate contract was "one by which the Plaintiffs personally sold to the Defendant and made themselves personally responsible as sellers to him as buyers; and that he was bound by a contract binding upon him as for a sale and purchase between him and the Plaintiffs;" and yet he held that the custom was valid and binding.

I cannot agree with the more elaborate judgment of *Blackburn*, J., in the Court of Exchequer Chamber; first, because he seems to me, in allowing the validity of the custom, to leave out an essential and vital part of it, namely, the obligation imposed by it on the merchant principal to accept the tallow offered him by the broker. Assume that there is no contract between the merchant and any other merchant, there is nothing to bind him to accept tallow at all except the words of the custom, "or if their principals refuse to accept, then to sell against them and charge them with the loss, if any." This obligation on the part of the Defendant to accept tallow offered to him by the Plaintiffs is wholly omitted from Mr. Justice *Blackburn's* expansion of the relation between the parties (1). And if it were inserted, it makes that relation, in my opinion, as I have above stated, the relation of parties to a contract of purchase and sale. If it does, *Blackburn*, J., agrees that the custom cannot be supported. And if it does not, I cannot agree with the judgment, because the foundation of it is, that the brokers ordered to make a contract for the Defendant, and ordered, as it seems to me, substantially to do nothing else, are wholly relieved from that obligation, and are yet to bind the Defendant. *Blackburn*, J., also in stating the proposition of law by which he determines that the Defendant is liable seems to me to omit the expression of a necessary condition. He says (2), "For I apprehend that where a person acting at the request of and in pursuance of an authority given by another has incurred a liability, and has in consequence been, before action, obliged to pay money in discharge of that liability, he is entitled to have that money repaid to him." He omits the condition that he should have been obliged to pay "by reason of the default of that other." If that be a necessary part of the proposition there must, in order to make the Defendant liable in

(1) Law Rep. 7 C. P. 110. (2) Law Rep. 7 C. P. at p. 102.

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this case, be introduced into the custom a liability of the merchant to accept tallow offered to him by the broker. The judgment of *Channell*, B., likewise, omits any mention of the obligation of the Defendant to accept. The order modified by the custom means, he says, "buy for my benefit in your own name; hand to me the goods when you get them; get them as cheaply as you can in the market; I will pay you the price you have to pay to the seller, and will pay you brokerage for your services." If to the last phrase had been added, "I will accept the goods, when you offer to hand them to me," I cannot help thinking it would clearly appear that the statement would amount to a contract of purchase and sale between the Plaintiffs and the Defendant.

I agree with *Blackburn*, J., that the difficulties of the case, whatever they may be, cannot be cured by any supposed equity as suggested by the Lord Chief Baron, entitling the Defendant to use the Plaintiffs' names, and sue upon the contract *pro tanto* beneficially for himself, and for a surplus as trustee for other purchasers. This, as it seems, without the consent of the other purchasers, or of any liability on their part to bear a share of the costs of the litigation by which, on the supposition, they would benefit.

Blackburn, J., in his judgment in the Exchequer Chamber, expresses an opinion that, if the custom be adhered to, there is no breach of the fiduciary relation between the broker and his employer. He relies much upon the fact of the broker entering into a contract in his own name with other principals, and thereby fixing himself to the prices of April. But, as it seems to me, he would be just as much fixed to the Defendant if he forwarded to the Defendant a bought note at the market price of the day without in fact entering into any other contract himself at that time. And although such conduct would be inconsistent with the custom as stated, I see great difficulty in its being detected by the merchant; and if the broker were desirous to speculate for a falling market, I see a great temptation to him to adopt such conduct. He would expect to fulfil the supposed or intimated contract made for the Defendant by purchasing tallow later in a fallen market. Or if the market were rising, or expected to rise, when the order was received, the broker might be tempted to

make his own contract at once, and delay a notification by a bought note to his employer as long as possible, and then notify at the higher price of that day. If the custom be adhered to, I can see no business reason for its establishment by brokers, except its giving to them facilities for earning more commissions on easier terms. I fail to see any advantage to the merchants who employ the brokers adequate to the loss of a carefully selected principal. It is a custom, therefore, invented by the body of brokers for their own exclusive advantage. It therefore, as it seems to me, falls within the observations with which I commenced this opinion. To hold it binding on a merchant, ignorant in fact of its existence, seems to me to be contrary to justice. I therefore submit to your Lordships that it cannot be sustained. I submit that the judgments below were erroneous, and ought to be reversed.

MR. BARON CLEASBY:—

The Plaintiffs in the action (the Respondents in the appeal) were tallow brokers carrying on their business in *London*.

On the 2nd of April, 1869, the Defendant, a *Liverpool* merchant, employed the Plaintiffs to buy for him 50 tons of tallow at 46*s.* 6*d.* (per cwt.) for delivery in June.

The Plaintiffs executed the order in the manner which will be afterwards mentioned, by making a contract with a firm of *Simpson & Co.*, tallow brokers in *London*.

At the time of delivery the Plaintiffs duly tendered to the Defendant tallow according to the contract, which he refused to accept, and the Plaintiffs having themselves become liable for the difference in price brought their action to recover this difference.

There was another transaction of 200 tons of date the 28th of April, but it is enough to deal with one contract, the same reasoning being applicable to both, though with some difference of detail.

The Plaintiffs executed the order to buy the 50 tons by entering into a contract with *Simpson & Co.* to buy 200 tons, and this contract was subject to a usage which may be generally stated thus, viz., that *Simpson & Co.* were not bound to deliver the 200

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tons, but only such number of tons as should be the balance of purchase and sales between them and the Plaintiff, such balance being taken at convenient time before the June delivery.

The question in the cause as regards the order of the 2nd of April is whether it was properly executed by the contract entered into with *Simpson*, because if it was the Defendant is clearly liable.

This question formed the subject of the judgments delivered in the Court of Common Pleas and in the Exchequer Chamber in favour of the Plaintiffs, and upon which in both Courts the Judges were equally divided, and by answering it the question put by your Lordships to the Judges is answered, viz. whether those judgments were right.

Having been one of the Judges in the Exchequer Chamber who thought that the employment was not properly executed, and delivered a judgment to that effect, which was fully brought under your Lordships' notice during the argument, I do not feel that I should be justified in occupying the time of your Lordships now by repeating at length the reasons then given, to which I beg leave to refer.

I quite agree that by employing a broker who acts upon a particular market you authorize him to make contracts upon all such terms as are usual upon the market, otherwise his hand would be tied and he might not be able to contract at all. Therefore, as regards all such matters as the time and mode of payment, the time and mode of delivery, the various allowances to be made, the mode of adjusting disputes as to quality, and all such matters as arise upon the contract made in the market, the principal would be bound by the usage, but not, I apprehend, because he must be supposed to have made inquiries and to have known them, but for the reasons given by Mr. Justice *Willes*, because they were within the authority conferred upon his agent.

These usages must not be confounded with local customs or usages connected with land, or the various rights belonging to it, or with modes of election to public offices, and matters of that nature. These have the force of law independent of persons consenting to them, and they are fixed and certain and cannot be changed. But the usages of what is called the *London* Tallow

Market have no legal obligation, except so far as persons expressly or impliedly consent to them. If persons thought proper they might make contracts expressly at variance with the usage.

No one would suggest that the *London* Tallow Market means an ancient public market with immemorial usages annexed to it. And the usages prevailing there may be changed from time to time according to the arrangement of persons belonging to the market or exchange, or perhaps of some committee appointed by them.

There seems to be no necessity to resort to so unreasonable a fiction as that persons who employ a broker, and who may send their instructions from all parts of the world, know the usages prevailing at the particular time upon the market where he acts. It is one thing to say that such usages adopted and prevailing at the time upon a particular market (or more correctly speaking, in a trade carried on at a particular place) regulate all contracts made there: but quite a different thing to say that they should regulate the employment of a person to act as broker, which is not a contract made upon the exchange, but something done, as in the present case, hundreds of miles away and where the usage was never heard of.

In answering your Lordships' question two matters have to be decided, viz., what was the employment of the Plaintiffs, and what was the performance of it.

As regards the first, Baron *Channell* thought the employment of the Plaintiffs was not as brokers in the ordinary sense, but in a different character, and he based his opinion entirely upon that view. But I submit the following reasons as shewing that the Plaintiffs were employed as ordinary brokers:—

First: The business of the Plaintiffs was that of brokers of the city of *London*.

Secondly: The employment is the ordinary one, on the Defendant casually meeting one of the Plaintiffs, *Unsworth*, at *Liverpool*, and giving him the order to buy fifty tons. It is true the price is given 46*s.* 6*d.*, but this must mean not exceeding 46*s.* 6*d.* The subsequent order of the 28th of April is to buy on the best terms.

Thirdly: It is expressly found that the Defendant did not know

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of any custom to qualify, in the manner mentioned, the employment as broker, and that no such custom existed at *Liverpool.*

Fourthly: The contract note sent by the Plaintiffs is signed by them in their character of brokers: "*Mollett, Bull, & Unsworth,* Sworn Brokers."

Fifthly: The usual brokerage of half per cent. is charged by the Plaintiffs to the Defendant. It is only necessary to refer to one letter, where £16 8*s.* 3*d.* are charged for brokerage upon £3282 6*s.* 5*d.*, the full invoice price before deducting discount and allowances.

And farther, the whole correspondence shews that the assumed position of the Plaintiffs was that of brokers, giving what was supposed to be independent advice. I will only advert to the letter of the 28th of April, 1869, inclosing the contract of the date, in which the following passage occurs:

"We trust the market will improve that you may make a profit. We ourselves think there is every sign of its doing so, and tallow bought now will pay."

If this be satisfactory to shew that the Plaintiffs were employed in the real character of brokers to buy for them, then it is unnecessary to trouble your Lordships with farther references to shew that what the Plaintiffs did was to make themselves the sellers, which is admittedly inconsistent with the character of brokers: *Bostock* v. *Jardine* (1).

But to shew how completely the Plaintiffs did actually become the sellers to the Defendant it is only necessary to refer to one paragraph in the case, from which it appears that upon balancing the purchases and sales from and to *Simpson & Co.*, the Plaintiffs had sold to *Simpson & Co.* 100 tons more than they had bought of them, so that all the sales by *Simpson & Co.* were, according to the usage, cancelled, and the Plaintiffs became the real sellers, and accordingly had to go into the market and buy 125 tons on the 28th of May.

The vice of the usage set up in the present case cannot be appreciated by examining its parts separately. It must be looked at as a whole, and its vice consists, I apprehend, in this, that the broker

(1) 3 H. & C. 700; 34 L. J. (Ex.) 142.

is to make the contract of purchase for another whose interest as buyer it is to have the advantage of every turn of the market; but if the broker may eventually have to provide the goods as principal, then it becomes his interest as seller that the price which he is to receive should have been as much in favour of the seller as the state of the market would admit. Thus the two positions are opposed.

The following passage from the work of one of the greatest writers on law, of a recent period, is properly applicable to the present case:—

"In this connexion also it seems proper to state another rule in regard to the duties of agents, which is of general application, and that is, that in matters touching the agency, agents cannot act so as to bind their principals where they have an adverse interest in themselves. This rule is founded upon the plain and obvious consideration that the principal bargains in the employment for the exercise of the disinterested skill, diligence, and zeal of the agent for his exclusive benefit": *Story* on Agency (1). And this rule is in passages which follow illustrated in the most forcible manner.

I submit that this fundamental and important rule cannot be defeated by a usage, or, as Mr. Justice *Willes* calls it, a lax practice of brokers, which is plainly of their own creation for their convenience and advantage in the settlement of speculative dealings.

I have purposely not gone into the formal objections that the Plaintiffs being employed to buy fifty tons made a contract for 200 tons and so gave the Defendant no principal to whom he could resort. This was decided in *Salomons* v. *Pender* (2) not to be an execution of the order and to deprive the broker of his claim for commission. It seemed unnecessary to consider how far the usage, if otherwise unobjectionable, might remove this more formal difficulty, as my opinion rests upon the substantial objections to the manner in which the employment was executed.

For the above reasons I answer your Lordships' question by saying, that in my humble opinion the judgments of the Courts of Common Pleas and Exchequer Chamber were not right and ought to be reversed.

(1) Sect. 210.

(2) 3 H. & C. 639; 34 L. J. (Ex.) 95.

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MR. JUSTICE GROVE.

MR. JUSTICE GROVE:—

The Plaintiffs below were employed by the Defendant as brokers, *i.e.*, as persons who were to negotiate a binding contract between sellers of tallow and buyers (the Defendant below), and it is not contended that, if their employment was as ordinary brokers, the Plaintiffs fulfilled the duty imposed by such employment; there was, as stated by my brother *Blackburn* in his judgment, "an important departure from the ordinary duty of a broker" and "the employer has a right to have the liability of the other persons as well" (*i.e.* of the seller, when the employer is buyer, as here). The question in the case is, can this ordinary duty be varied by the custom of a market of which the employer is ignorant in fact, and from the circumstances of the case cannot reasonably be presumed to know? This custom appears to me not merely to change modes or incidents of the sale, as, *e.g.*, mode of delivery, time and manner of payment, degree of credit, rate of discount, &c., but to change substantially the nature of the employment and the relations of the parties to the contract. I do not think a person dealing in a market of the customs of which he is ignorant, though he may be bound to inquire as to usages such as those I have referred to, or if he do not inquire into them may fairly be deemed bound by them, is bound to inquire into a usage by which a broker is in fact not a broker, or is to be bound by the acts of a supposed broker when he has not all the correlative advantages resulting from the performance of a broker's duties for which he pays commission.

An order "buy for me," and a bought note "bought for your account," I cannot but think mean respectively "buy" or "bought" in the ordinary sense and ordinary acceptation of such instruments, and although the late Mr. Baron *Channell* seems to have been of opinion (1) that because the order does not use the terms "as an ordinary broker does," it is capable of a construction applicable to a mere order to buy, though not as an ordinary broker, I cannot, with the most unfeigned respect for that learned Judge, adopt that view, the order being given as to ordinary brokers, and the Defendant having no reason to believe that the Plaintiffs acted in any other capacity.

(1) *Mollett* v. *Robinson*, Law Rep. 7 C. P. at p. 116.

If the short terms of mercantile contracts, because they do not expressly exclude other than the ordinary accompaniments, are to be taken to admit of such being incorporated with them when these vary the ordinary legal relations of the parties to them, if such variance of relation be a custom of a market known only to one of the parties, and advantageous or possibly advantageous to such party, it seems to me that elements of great uncertainty would be introduced into such supposed contracts, business transactions would be much hampered, and the parties be not really *ad idem*.

The late learned Chief Justice of the Common Pleas, in the judgment of himself and Sir *Montague Smith* (1), says that the Plaintiffs, under the circumstances of the case, "must be taken to intimate to the Defendant by such bought notes that they had bought on his account of themselves, that is, that they had personally sold to him, and made themselves personally responsible as sellers to him, as the buyer upon such bought notes, and the Defendant, being bound by the usage, and writing the letters which were put in evidence at the trial, must be taken to have assented to the terms of those bought notes, so as to make contracts binding upon him as for sales and purchases between him and the Plaintiffs, upon the terms of those letters." I see nothing in the bought notes or in the letters of the Defendant which to my mind can fairly import such a construction. I am of opinion with the late Mr. Justice *Willes*, that here the importation of the usage "does not merely control the mode of performance of the contract, but that it changes its intrinsic character," that it converts a broker into a principal seller without the knowledge of the buyer who employs him, and that it must therefore be rejected. It not improbably deprives the buyer of that for which he bargains, viz., exertion of skill on his behalf and the experience of the agent he pays. That the person employed as broker has, probably, by this sort of transaction, an interest adverse to that of his employer, is an argument already enforced in the judgments of several of the learned judges, and is not merely an argument *ab inconvenienti*, but goes far to shew that the usage really varies the nature of

(1) *Mollett* v. *Robinson*, Law Rep. 5 C. P. at p. 654.

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the transaction from that contemplated by the parties and expressed in the order and bought notes reasonably read as mercantile documents. I am of opinion that the Plaintiffs have not made such a contract as they were employed and paid to make, and I therefore answer your Lordships' question in the negative.

MR. BARON AMPHLETT.

MR. BARON AMPHLETT:—

My Lords, as I agree with the opinion of my Brother *Blackburn* in this case, and with the reasoning on which it is rested, I will forbear travelling over the same ground, and will content myself with saying, in answer to your Lordships' question, that in my opinion the Courts of Common Pleas and Exchequer Chamber are right.

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LORD CHELMSFORD:—

My Lords, the great difference of judicial opinion in this case has led to the extraordinary result of there being nothing but a formal judgment given in both the Courts below.

The Respondents (*Molletts*) brought their action to recover damages for the non-acceptance by the Appellant (*Robinson*) of quantities of tallow, the subject of certain contracts which it was alleged had been entered into by *Robinson*, or by *Molletts* as brokers on his account. At the trial a verdict was entered for the Plaintiffs by consent, leave being reserved to the Defendant to move to set aside the verdict, and to enter a nonsuit or a verdict for the Defendant. A rule was obtained by the Defendant in the Court of Common Pleas, but upon the argument of the rule the Judges of that Court were equally divided in their opinions, and consequently the rule was discharged, and judgment was entered for the Plaintiffs upon the verdict taken by consent. Upon appeal to the Exchequer Chamber, the same equal division of opinion amongst the Judges occurred, and therefore the judgment of the Court of Common Pleas was not disturbed. Upon this singular state of things there never has been an actual judgment in either of the Courts as to the Plaintiffs' right to recover in the action. Of the Judges who were summoned to assist your Lordships, there were three who had not previously heard the case, and they differed in opinion, the result being that we have six Judges taking one view

of the case, and seven the other. It may well be supposed, therefore, that the question to be determined is involved in some difficulty.

The question shortly stated is whether, upon an employment of the Respondents as brokers, to purchase a quantity of tallow for the Appellant, a custom existing in the tallow trade is incorporated into the relation between the parties so as to render the Appellant liable to indemnify the Respondents against losses which arose upon certain contracts entered into by them, in order to enable them to provide the requisite quantity of tallow for the Appellant.

The Respondents are brokers, carrying on business in the city of *London*, and the Appellant is a merchant at *Liverpool*. On the 2nd of April, 1869, the Appellant met one of the Respondents at *Liverpool*, and gave him an order to "buy for him 50 tons of tallow, June delivery, at 46*s*. 6*d*." On the same day the Respondents sent a bought note to the Appellant, with a letter beginning in these terms: "We have received a message to buy for your account 50 tons tallow, June delivery, at 46*s*. 6*d*., and which we succeeded in doing." On the 28th of April, the Appellant sent a farther order to the Respondents, by telegram, from *Liverpool*, as follows: "28th April, 1869. *Mollett, Bull, & Unsworth, London. Charles Robinson.* Buy 200 tons tallow for June delivery, best terms."

On the same day, in answer to the telegram, the Respondents sent to the Appellant a bought note as follows: "*London*, 28th April, 1869. *C. J. Robinson.* We have this day bought for your account 200 tons net."

Upon receiving the order of the 2nd of April, the Respondents entered into a contract with a Russian broker, trading under the firm of Messrs. *Simpson & Co.*, for the purchase of 150 tons of tallow, intending to appropriate 50 tons out of the 150 tons to the Appellants' order, and 100 tons to another order, which the Respondents had received from another person, and the Respondents made out and sent to Messrs. *Simpson & Co.* a sold note in respect of the 150 tons as having been sold on account of *Simpson & Co.*, and received from *Simpson & Co.* a bought note for the 150 tons, as having been bought on account of the Respondents. On receiving the second order, of the 28th of April, the Respondents

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entered into a contract with a firm of Messrs. *Rayner & Co.* for the purchase of 200 tons of tallow, and into another contract with Messrs. *Simpson & Co.* for the purchase of 150 tons of tallow, intending to appropriate to the Appellant's second order these 150 tons, and 50 tons out of the 200 tons purchased from *Rayner & Co.*, and similar bought and sold notes as before were passed between the parties.

Settlements of transactions in tallow are usually made in April, May, and June, and on the May settlement the firm of *Simpson & Co.* failed, and were unable to meet their engagements. At the time there were many transactions outstanding in respect of the sale and purchase of tallow between *Simpson & Co.* and the Respondents. Upon the settlement of accounts between them, and setting off the quantity of tallow sold against the quantity of tallow purchased by the Plaintiffs on account of *Simpson & Co.*, it appeared that the Respondents had sold between 100 and 200 tons more to *Simpson & Co.* than they had purchased on their own account. These purchases, therefore, according to the usual mode of settling accounts in the tallow trade, were cancelled.

On the 31st of May the Respondents gave the Appellant notice that they were ready to deliver fifty tons of tallow in fulfilment of his order of the 2nd of April. On the 1st of June they gave him notice that they were ready to deliver seventy-five tons in part fulfilment of his order of the 28th of April, and on the 8th of June a farther notice that they were ready to deliver seventy-five tons more tallow in farther fulfilment of his order of the 28th of April. The Appellant, having ascertained that *Simpson* had failed, and had never tendered any tallow to the Respondents, gave them notice on the 15th of June that he would not accept the tallow offered in fulfilment of his orders.

The tallow to which the Respondents' notices, above-mentioned, refer, was purchased by the Respondents, as to fifty tons from Messrs. *Brown & Co.* on the 17th of March, 1869, as to thirty tons from Messrs. *Rayner & Co.* on the 26th and 28th of April, 1869, as to twenty-five tons from Messrs. *Vaughan, Smith, & Co.*, on the 4th of May, 1869, and as to 125 tons from Mr. *Stonehouse* on the 29th of May, 1869. On the refusal of the Appellant to accept the tallow offered to him, the Respondents sold it, and claimed to be indemnified by the Appellant for the loss they had incurred by

the difference in the price for which they sold the tallow, and that which they had allowed to *Simpson & Co.* and *Rayner & Co.* And upon the refusal of the Appellant to pay the amount of the difference, this action was brought.

The only question in the case is, whether the Appellant is bound by a custom as to brokers existing in the *London* tallow trade, of which he was ignorant, merely by the employment of the Respondents as his brokers to buy for him, and their purchase, in the *London* market, of the quantity of tallow ordered.

In the 29th paragraph of the case upon appeal, it is stated as follows:—"At the trial it was proved that there exists an established custom in the *London* tallow trade for brokers when they receive an order from a principal for the purchase of tallow, to make a contract or contracts in their own names, without disclosing their principals, and also to make such contracts, either for the specific quantity of tallow so ordered, or to include such order with others they may have received in a contract for the entire quantity, or in any quantities at their convenience, at the same time exchanging bought and sold notes with the selling brokers, and passing to their principals a bought note for the specific quantity ordered by them. When a broker so purchases in his own name, he is personally bound by the contract. On the usual settling-days the brokers balance between themselves the purchases and sales made, and make or receive deliveries to or from their principals, as the case may be, or if their principals refuse to accept or deliver, then to sell or buy against them, and charge them with the loss (if any); or if delivery is not required on either side, then any difference which may arise from a rise or fall in the market is paid by the one to the other." It is added, "This custom does not exist at *Liverpool*, and was unknown to the Defendant."

In the arguments and in the judgments in this case, it seems to have been taken for granted that the custom applies in the case of a single transaction of a broker buying in the market upon the order of a principal. But upon a careful examination of the terms of the custom as stated, it appears to me that it merely regulates the dealings of brokers amongst themselves, in buying and selling as principals, and the mode of adjusting and settling accounts with each other, and that no part of it is applicable to the ordinary employment of a broker engaged to buy for a real principal.

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Assuming, however, that the custom would have applied in the present case if it had been known to the Appellant at the time of employing the Respondents as his brokers, the question arises whether it is of such a nature as to be binding on a person who is ignorant of its existence, by merely employing a broker to buy for him in the market where the custom prevails.

The effect of this custom is to change the character of a broker who is an agent to buy for his employer, into that of a principal to sell for him. No doubt a person employing a broker may engage his services upon any terms he pleases; and if a person employs a broker to transact for him upon a market with the usages of which the principal is unacquainted, he gives authority to the broker to make contracts upon the footing of such usages, provided they are such as regulate the mode of performing the contracts, and do not change their intrinsic character. It was not contended in the present case that if the Respondents were employed in the ordinary character of brokers, they had performed their duty to their employer. Of course, if the Appellant knew of the existence of the usage, and chose to employ the Respondents without any restriction upon them, he might be taken to have authorized them to act for him in conformity to such usage.

The late Lord Chief Justice of the Common Pleas in his judgment said: "If the usage is introduced, as we think it may be, and the Defendant is bound by it, as we think he is, then the inference which we should draw from the fact is, that the Plaintiffs having signed the bought notes sent to the Defendant, and not having disclosed the name of any principal, and in fact not having any principals for the particular contracts evidenced by such bought notes, must be taken to intimate to the Defendant by such bought notes that they had personally sold to him, and made themselves personally responsible to him as the buyers upon such bought notes, and then the Defendant being bound by the usage and writing the letters which were put in evidence at the trial, must be taken to have assented to these bought notes, so as to make contracts binding upon him as for sales and purchases between him and the Plaintiffs upon the terms of these letters."

I really am at a loss to see how the bought notes could give the information which the late learned Lord Chief Justice found in them. They are, as to both the orders, in the same terms, the

only difference being as to quantities, "We have this day bought for your account so many tons nett." These were sent to inform the Appellant that his orders to buy tallow for him had been obeyed. How could the Appellant understand that the orders given, "buy for me," had been interpreted "sell to me," and had been so executed? Nor would the bought notes disclose to the Appellant that the Respondents had no principals for the particular contracts evidenced by the bought notes. "Bought for you" would rather intimate that the Respondents had contracted with an independent seller, some third person, and not that they had bought of themselves for the Appellant. And in the letters accompanying the bought notes the seller is mentioned as a third person, and the terms of the contract with him are minutely detailed.

I find nothing in the facts of the case which appear to me to justify the opinions of the Judges who were in favour of the Plaintiffs, that they were employed not as ordinary brokers, but in a different character. A different relation can be established only by incorporating the usage into the employment. Mr. Justice *Blackburn* said, in his opinion delivered to your Lordships, "that the Respondents' mode of executing the Appellant's orders was a departure from the ordinary duty of a broker, that duty requiring the broker to establish privity of contract between the two principals." Now the mere intention to appropriate a portion of the tallow agreed to be purchased from *Simpson & Co.*, and *Rayner & Co.* respectively, could not possibly establish a privity between them and the Appellant, even if the delivery of a smaller quantity than that which they had agreed to sell could have been enforced against them. Besides, in the case of *Simpson & Co.*, there was, virtually, no tallow in existence, which, by their contract with the Respondents, *Simpson & Co.* could have been called upon by the Appellant to deliver to him; the purchases from *Simpson & Co.*, by the effect of the custom upon their transactions with the Respondents (in which a larger quantity of tallow had been sold to them than had been bought by them) having been cancelled.

I have already intimated the doubt which I entertain whether the usage of the *London* tallow trade applies, at all, to the case of an ordinary transaction between broker and principal. Assuming,

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however, that it does, I hesitate to say that it would not apply in the case of persons knowing of its existence, and employing a broker to act for them in the market where it prevails. But the usage is of such a peculiar character, and is so completely at variance with the relation between the parties, converting a broker employed to buy, into a principal selling for himself, and thereby giving him an interest wholly opposed to his duty, that I think no person who is ignorant of such an usage can be held to have agreed to submit to its conditions, merely by employing the services of a broker, to whom the usage is known, to perform the ordinary and accustomed duties belonging to such employment.

I submit to your Lordships, that the judgments of the Common Pleas and of the Exchequer Chamber ought to be reversed, and the judgment entered for the Defendant *Robinson*.

THE LORD CHANCELLOR (Lord *Cairns*):—

My Lords, in this case I agree so entirely with the observations of my noble and learned friend, and the case has been so completely exhausted by him, and by the reasoning in the opinions of Mr. Justice *Mellor*, Mr. Justice *Brett*, Mr. Baron *Cleasby*, and Mr. Justice *Grove*, that I should not feel myself justified in detaining your Lordships by repeating what has already been (to my mind) so satisfactorily stated. I agree with the motion of my noble and learned friend.

LORD HATHERLEY:—

My Lords, I entirely concur.

LORD O'HAGAN:—

My Lords, I am of the same opinion.

Judgment of the Court of Exchequer Chamber reversed, and judgment entered for the Defendant.

Lords' Journals, 6th July, 1875.

Attorneys for Plaintiff in Error: *Simpson & Cullingford.*
Attorneys for Defendant in Error: *Thomas & Hollams.*

WILLIAM BUTCHER (TRUSTEE, &c.) . . . APPELLANT;

AND

LAWRENCE AND HENRY STEAD . . . . RESPONDENTS.

1875

June 25;
July 12.

Bankruptcy Act, 1869—*Protected Payments.*

The concluding words of the 92nd section of the 32 & 33 Vict. c. 71 (the *Bankrupt Act*, 1869), giving protection to payments, &c., made as therein specified, apply to a creditor of the bankrupt, and not merely to his transferee.

Where, therefore, a person sold goods to another as upon a cash credit, and, just before the credit expired, received from the vendee, then on the eve of bankruptcy, payment for those goods, being, at the time of such payment, entirely without knowledge or even suspicion of the true state of the vendee's circumstances, he was held to be protected.

S., a calico merchant at *Manchester*, sold calico, in September, to *M. & W.*, calico printers there, on the usual terms of the *Manchester* market, which would have made payment due on the 2nd of December. *M. & W.* were at the time of the purchase (though quite unknown to *S.*) in insolvent circumstances. In November *M. & W.* sold a large part of their stock-in-trade, and directed their cashier to pay their trade creditors. The cashier did so, and on the 22nd of November paid *S.*, taking discount and rebate of interest in the ordinary way. *M. & W.* were largely indebted to other persons for advances, and on banking accounts. On the 3rd of December, *M. & W.* filed a petition for liquidation, and a trustee was appointed. The trustee sought to get back the money which had been paid to *S.*:—

Held (*dub.* Lord *Selborne*), that *S.* was protected as "a payee, in good faith, and for valuable consideration," within the words of the 92nd section of the *Bankruptcy Act*, 1869.

THIS was an appeal against a decision of the Lords Justices, which had affirmed a previous decision of the Chief Judge in Bankruptcy.

Two persons named *Meldrum & Wydler* carried on business as calico printers at *Belfield*, near *Manchester*. They had dealings with Messrs. *Stead*, who were manufacturers at *Manchester*, and supplied *Meldrum & Wydler* with cloth for printing. There was a custom in the trade known as the "*Manchester* terms," by which all cloth purchased before the 25th day of any one month was to be paid for, in cash, on the first Tuesday after the end of the next succeeding month, and cloth bought on the 25th, or any

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subsequent day, of one month was to be paid for, in cash, on the first Tuesday after the end of the second month then next ensuing. On such payments there was a settled discount of 1½ per cent.

On the 30th of September, 1873, the Respondents sold to *Meldrum & Wydler* cloth of the value of £144, and on the 9th of October they sold cloth of the value of £46, and by the custom of the trade the payment for both lots was to be made on Tuesday, the 1st of December, 1873.

In November, 1873, *Meldrum & Wydler* found that it was impossible for them to continue carrying on their business, and they sold a considerable portion of their stock in trade, and directed their cashier to pay their trade creditors in full as far as their means would permit, thus leaving their other creditors unpaid. To these other creditors they owed large sums of money, most of them for money advances, some of which were secured on promissory notes falling due on the 14th and 23rd of November. The cashier, in pursuance of the orders he had received, paid, on the 22nd of November, to Messrs. *Stead* the amount of their claim for goods, taking £2 17*s.* for discount and 8*s.* 3*d.* for interest, and thus reducing the original debt of £190 to the sum of £186 14*s.* 9*d.* The £2 17*s* were made up of the 1½ per cent., which would be deducted on payment under the ordinary "*Manchester* terms" if the debt had been paid when, strictly, it was due—on the 2nd of December, and of the sum of 8*s.* 3*d.* which was a rebate for payment being made ten days in advance, namely, on the 22nd of November.

On the 3rd of December, 1873, *Meldrum & Wydler* filed their petition for liquidation in the *Manchester* County Court. The Appellant was appointed trustee under the liquidation; and, on the 12th of February, 1874, made an application to the Court against *Stead & Co.*, requiring them to repay the sum they had received as a sum received in fraudulent preference. The case came on before the Judge of the *Manchester* County Court on the 3rd of March, 1874, when an order was made for the repayment of the sum of £186 13*s.* 9*d.*, with costs. On appeal to the Chief Judge in Bankruptcy this order was, on the 20th of April, discharged with costs. The trustee appealed to the Lords Justices,

who, on the 5th of June, dismissed the appeal with costs (1). The present appeal was then brought.

Mr. *Herschell*, Q.C., and Mr. *Ford North*, for the Appellant (Mr. *S. Taylor* with them):—

There is here no doubt that there was, in fact, a preference of one creditor over another. The circumstances of the case are such as to constitute a fraudulent preference under the 92nd section of the *Bankruptcy Act*, 1869. The great reliance of the Respondents here was, that when they received payment they knew nothing of the real condition of the bankrupt's business, and so, taking payment in perfect ignorance, they were not liable to return it. But that argument is not in accordance with the spirit of the bankrupt laws, or with the decisions which have taken place upon them. What the spirit of those laws was, may be seen from the earliest cases. In *Alderson* v. *Temple* (2) a promissory note was voluntarily sent by the debtor to the creditor, who received it by post, and took it in perfect ignorance of the circumstances under which it was sent, but, as it was sent on the eve of bankruptcy, it was treated as a fraudulent preference, and the transfer was therefore held void. The case in which a limitation to that rule was admitted, was one where the party making the preferential payment was under a degree of pressure, or fear, which took away all free will from him. *De Tastet* v. *Carroll* (3) was a case of that kind, and there an act of forgery was involved in the circumstances. This distinction between an act done voluntarily, or done under serious pressure, was discussed and adopted in *Marks* v. *Feldman* (4), where *Alderson* v. *Temple* (2), in which Lord *Mansfield* had strongly adverted to that distinction, was cited and commented on. It has always been the rule to refer the act which makes a preference a fraudulent preference to the motives of the debtor. To apply a different rule now, dependent upon whether the creditor was innocent in allowing himself to be preferred, would be to introduce a new matter, the introduction of which might be most dangerous. If the debtor wilfully preferred him that was sufficient,

(1) Law Rep. 9 Ch. Ap. 595.
(2) 4 Burr. 2235; 1 Sir W. Bl. 660.
(3) 1 Stark. 88.
(4) Law Rep. 5 Q. B. 275, see p. 283.

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until this Act of 1869 was supposed by the proviso at the end of the 92nd section to introduce a new qualification into the law of fraudulent preference. There is no justification for that supposition. The Act was intended to make the law against fraudulent preference more, not less, strict. The section declares that all the things therein named made or done by a debtor unable to pay his debts as they become due from his own moneys, "in favour of any creditor, with a view of giving such creditor a preference over the other creditors" shall, if the person making or doing the same become bankrupt within three months, "be deemed fraudulent and void as against the trustee." Nothing can be clearer or more express than these words; there is no qualification restraining their general operation; there is not one word said about the ignorance or the innocence of the creditor; the law applies equally whether the creditor knew or did not know the condition of the debtor. No one can deny that everything which the section describes and denounces has happened in this case. To make valid a preference like this would really be to enable debtors to do exactly what they pleased in favour of any particular creditor. The 94th and 95th sections, though passed to protect certain transactions, will not affect this. They do not apply here, but they furnish an argument to shew that this transaction is beyond the limit of any protection intended to be afforded by the statute.

Then does the proviso at the end of the section afford protection to such an act of preference? It does not. The proviso was not intended to apply to a person already a creditor, but to those persons who might, ignorantly and in good faith, receive from a preferred creditor goods or securities which had been obtained by him from the debtor. Such a third person might be, "in good faith," the purchaser of goods, the payee of a money security, or the incumbrancer upon property which had been fraudulently handed over by the bankrupt to his original creditor, but which might properly be protected if in the hands of a third person who was not a creditor of the bankrupt, and had no dealings with him. If the original creditor had been intended to be protected there would have been the ordinary form of taking "without notice"; there was nothing of the kind here; the doubtful question of notice was not introduced;

the transaction between the debtor and the creditor was declared to be void upon a matter of fact as to which no doubt could be raised, namely, bankruptcy within three months. It became, therefore, necessary, as the goods or securities might have been passed to other parties, to protect those other and really innocent parties against the consequences of what had been done by those who could hardly be deemed ignorant or innocent. Again, "valuable consideration" in this proviso could not mean the original debt; it must refer to something passing at the moment as a consideration, and that plain and simple construction, quite warranted by the spirit of the 94th and 95th sections, made the whole of the clause harmonious and intelligible. Such a construction, too, was in accordance with the spirit of the old bankrupt law: *Stevenson* v. *Newnham* (1), where it was treated as established law that dispositions of property might be void as between the parties to them, but might be valid as to persons not parties to them.

On the facts here it could hardly be doubted that the creditors must have known the real position of the debtor.

Mr. *Benjamin*, Q.C., and Mr. *Marten*, Q.C. (Mr. *T. H. Jordan* was with them), for the Respondents:—

There is no pretence for saying that in this case the creditors knew the position of the debtor, and therefore the suspicion of want of good faith is, as a matter of fact, wholly unwarranted. That condition could only be known by examining the books of *Meldrum & Wydler*, or by being aware that they were often requiring money advances. Persons who, like the Respondents, merely supplied them with goods in the ordinary way of trade, who generally obtained payment according to the local custom affecting that trade, and who, in this particular instance, because they obtained payment a few days before it could strictly be demanded, were required to allow, and did allow, discount and rebate, required by custom in that particular trade, could not therefore be subjected to the imputation of that want of good faith which would deprive them of the protection of the last enactment (for it

(1) 13 C. B. 285.

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was not a mere proviso, but a distinct enactment) of the 92nd section of the statute.

The question was therefore reduced to one on the construction to be put on the words of that enactment. The words of the earlier part of the 92nd section declared payments and transfers of property, made by a person unable to pay his debts out of his own moneys, void, if he should become bankrupt within three months, and no doubt it did not refer in that part to the creditor receiving payment, and require him to shew that he received payment without notice of the condition of the bankrupt. But that only rendered stronger the argument that if the creditor within the words of the last clause of the section acted in good faith he should be protected. He had acted in good faith here. He had sold his goods on the well-known terms of the *Manchester* market. Those terms constituted what in the commercial world there, was considered a cash transaction, and he received payment as upon a cash transaction, and allowed the usual discount on that very ground.

But then it was argued that though he might in that way be within the spirit of the section he was not within its words, for those words "purchaser, payee, or incumbrancer" applied not to a creditor but to some one who received goods or payment or securities from the creditor after he had obtained them from the debtor. There was not either in this section or in any other part of the Act any provision which justified or even suggested such a construction. The Act dealt with debtors, with their creditors, and with trustees of a bankrupt's estate, but in no part did it point to any intention to distinguish between the creditors of a bankrupt, and the persons who might have relations with them. It made certain acts, as fraudulent preferences, void, but if such acts did not amount to fraudulent preferences, if they were acts as to which the creditor acted in good faith, and received a benefit for which he had given a valuable consideration, he was protected. Here a valuable consideration had been given. The calico printers, in order to carry on their business, bought goods after they knew that they were in insolvent circumstances, they bought those goods as a cash transaction, and they paid for

them as upon a cash transaction. The sale was in every respect a valuable consideration, and the whole transaction was on the part of these Respondents conducted in perfect good faith.

Mr. *North* replied.

THE LORD CHANCELLOR (Lord *Cairns*):—

My Lords, I cannot doubt that there was in this case, within the meaning of the 92nd section of the *Bankruptcy Act* of 1869, a payment, made by a person unable to pay his debts as they became due, from his own moneys, in favour of a creditor, with a view of giving that creditor (along with several others) a preference over other creditors; and that, if there was nothing more in the case, inasmuch as the person making the payment became bankrupt within three months, the payment must be deemed fraudulent and void as against the trustee of the bankrupt.

I do not forget the observations made by the counsel for the Respondents, that the goods supplied to the bankrupts, in respect of which the debt arose, were supplied in order to enable them to carry on their trade, and after they had fallen into the state of insolvency contemplated by the section in question. If the goods had been supplied for ready money, if the money had been taken in exchange for the goods, it might well be that the exchange of goods for ready money would have negatived the inference of a fraudulent preference. But the goods were here supplied upon credit, and although the bankrupts, by obtaining credit on the pretence of carrying on business, might, if that pretence was false, and if a jury should not be satisfied they had no intent to defraud, have made them liable to punishment for a misdemeanour, the subsequent payment for the goods so supplied on credit, might not the less be a preference of the particular creditor, which would be deemed fraudulent and void.

The question, and the only question, appears to me to be whether the transaction, being a fraudulent preference so far as the bankrupts were concerned, is, by the last words of the 92nd section, protected *quoad* the Respondents, the recipients of the payment, who, as is admitted, had no knowledge of the fraudulent preference which was intended.

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There is no doubt that the 92nd section of the Act of 1869 introduced a considerable change into the law on this subject. Before the Act of 1869, payments by way of fraudulent preference were held to be void, but were not forbidden by any express enactment; and the Act of 1869, possibly because the administration of bankruptcy was for the future to be taken in great part away from the Court, and placed in the hands of trustees, appears, in the case of fraudulent preferences and many other similar cases, to have endeavoured to reduce into definite propositions the law that hitherto had to be derived from a comparison of decided cases. The Act, however, did not profess to express the existing law without making considerable changes in it. In the case of fraudulent preference, for example, in place of raising an inquiry whether it was done in contemplation of bankruptcy, the Act provided certain definite tests, namely, that the bankrupt should have been at the time unable to pay his debts, as they became due, from his own moneys, and that he should become bankrupt within three months from the date of payment. The Act appears to have left the question of pressure as it stood under the old law; and, indeed, the use of the word "preference," implying an act of free will, would, of itself, make it necessary to consider whether pressure had or had not been used, and this appears to have been the opinion of the Lords Justices in the case of *Ex parte Topham* (1).

The section, however, contains at the end of it a provision which appears to me to introduce a new ingredient into the consideration of fraudulent preferences. Before the Act of 1869, if a payment had been made of a debt without pressure and in contemplation of bankruptcy, it would have been a fraudulent preference, even although the person receiving the payment did not know that he was being fraudulently preferred.

The 92nd section, however, now ends with this provision, "This section shall not affect the rights of a purchaser, payee, or incumbrancer in good faith and for valuable consideration." What is the meaning of the words "This section shall not affect the rights of a payee?" In my opinion the word "payee" is to be

(1) Law Rep. 8 Ch. Ap. 614.

read as meaning "person receiving payment as a creditor." Now what are the rights of a person receiving payment as a creditor? His rights undoubtedly are *primâ facie* to keep the money which he so receives. What is the meaning of the words "in good faith and for valuable consideration?" I think there can be no doubt that the words "in good faith" mean without notice that any fraud or fraudulent preference is intended. The words "for valuable consideration" are more difficult to explain. They occur also in some places in sects. 94 and 95, and it might be doubted whether the words "for valuable consideration" had not been introduced in clause 92 and coupled with the words "in good faith" without observing that they were perhaps less appropriate in sect. 92 than in sects. 94 and 95. The words, however, are capable of the construction put upon them by the Lords Justices, namely, that they are used to negative the payment of a voluntary bond or covenant for which no value was given; or they may have been used as applicable to the words "purchaser or incumbrancer" though less applicable, or not applicable at all, to the word "payee."

The argument of the Appellant, however, fails to give any effect whatever to this provision at the end of the 92nd section, and it appears to me to be a provision intended to have a specific and particular effect, and I am unable to see that any meaning or effect can be given to it except that given by the Lords Justices. I think it was the intention of the Legislature, in defining for the first time the law as to fraudulent preference, and changing the old rule as to contemplation of bankruptcy into a rule which exposed the payment to be impeached for a period so long as three months, to accompany and temper this enactment by a provision of great convenience in mercantile dealings, and giving a protection, where it is obviously much required, to those who, in good faith, take money that ought to be paid to them, without notice that the person paying is doing anything injurious to his other creditors.

In my opinion the judgment of the Court of Appeal in Chancery ought to be affirmed and the appeal dismissed with costs, and I move your Lordships accordingly.

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LORD HATHERLEY:—

My Lords, I have come to the conclusion that the interpretation to be placed upon the 92nd section of the *Bankruptcy Act* of 1869, is that which has been given to it by my noble and learned friend on the woolsack. I think that there may be some difficulties in attributing this meaning to the exact form of words which has been employed in this section, but looking at the saving as it comes in at the end of the section, and finding that the saving is intended to counteract the effect of the section itself, the words being not "provided that nothing in this Act contained shall affect" such and such rights, but "this section shall not affect" these rights, one naturally would look at the antecedent words contained in that section which had imposed the consequence of nullity upon certain deeds on the part of a debtor afterwards becoming a bankrupt. Looking at that earlier part of the section, we find that the Legislature has imposed this consequence of nullity in all cases where the bankrupt conveys by way of purchase, where he encumbers, and where he makes any payment, as well as does certain other acts such as the taking or suffering any judicial proceeding, which of course must mean taking or suffering any judicial proceeding affecting his property. That being so, you would expect, *à priori*, to find that the saving would have a corresponding relation to the acts struck at in the anterior part of the section, and that it would provide that in certain cases those acts should not be attended with the consequence of nullity. In that way, applying the words "purchaser" and "incumbrancer" to the words in the previous part of the section referring to a conveyance or a mortgage, you are led up to the word "payee," which, although not used according to the ordinary legal meaning of the word, seems, appropriately enough for the purpose of the section, to express a person to whom a money payment is made.

Indeed, the only other construction which has been suggested on the side of the Appellant is that by these words "purchaser, payee, or incumbrancer," the Legislature must have intended to save the interests of third persons, although destroying the interests of the creditor to whom the particular payment or transfer by way of sale or incumbrance had been made; and that it

intended that where there had been a mortgage made or a sale made, or a payment made within three months before bankruptcy, in any of those cases the creditor, who had become a purchaser or a mortgagee, or had obtained payment, should lose the benefit of that purchase, that incumbrance, or that payment so made to him, but that his so losing it should not affect with nullity the instrument he took, provided he had passed it over to a third person who had taken it without notice and without knowledge.

I confess, my Lords, that strikes me as a very forced construction, especially when you come to the word "payee," because what is suggested there is, that the favoured creditor might be paid by a cheque or by a bill of exchange, that he might hand over this cheque or this bill to a third person, and that it was intended that that person should be entitled to recover upon it, although the person who received the cheque or the bill of exchange originally could not, as between himself and the trustee, have insisted upon such payment. It appears to me that the word "payee" is sufficient, although not perhaps thoroughly technical in its import, to indicate a favoured creditor to whom a payment is made. I think the Legislature intended to say that if you, the debtor, for the purpose of evading the operation of the bankruptcy laws, and in order to give a fraudulent preference, make this payment or this charge it shall be wholly done away with except in cases where the person you have so favoured is wholly ignorant of your intention to favour him and receives payment simply for valuable consideration and *bonâ fide*, that is, without any notice of any intention on your part fraudulently to favour one creditor above another. I take the words "in good faith and for valuable consideration," to mean this: it might be that either a voluntary bond for a payment, or some other voluntary instrument, might have been given by a debtor if he was willing to favour a relative or any other individual; but, in order that the favoured individual to whom he had given such a bond, or made a payment, should be exempted from the previous part of the section he must have received it *bonâ fide*, that is, he must not be conscious himself of an intention to favour one creditor above another, and he must farther have given "valuable consideration" for it. That will entitle him to

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hold that payment so made to him in preference, he himself not being a guilty party, I mean not being conscious of a preference being intended to be given to him.

My Lords, I think that is a reasonable sense to give to this proviso, having regard to the scope and the frame of the previous part of the section. It appears to me I confess the more natural and obvious conclusion to arrive at, that these words are so used; and therefore I concur in the judgment proposed by my noble and learned friend.

LORD O'HAGAN:—

My Lords, in this case two states of fact seem, beyond controversy, to have existed. In the first place, it is plain that the debtor was guilty of a fraudulent preference within the meaning of the 92nd section of the *Bankruptcy Act* of 1869. He made a payment when he was unable to discharge his debts from his own moneys, and with a view unduly to prefer one creditor to others. It is farther and equally plain that the creditor so preferred had a *bonâ fide* claim against the debtor, had no notice or knowledge of the circumstances, and, in receiving payment of the debt, acted in perfect good faith.

The sole question is whether the preferred creditor is protected by the proviso of the 92nd section, and entitled to retain the money paid to him, notwithstanding the admitted fraud of the debtor. I think he is; and that if he were not, the proviso would fail of the result which was intended by the Legislature.

It has been strongly urged that such a construction of the proviso will tend to the practical repeal of the salutary restrictions imposed by the law on fraudulent preference, and enable a debtor to dispose of his estate, in contemplation of bankruptcy, for the benefit of one set of his creditors and to the detriment of the rest. And certainly, there is force in the argument, for it is impossible to doubt that such a mischief to some extent may reasonably be apprehended.

But, on the other hand it is said, with equal force, that reason and justice warrant protection to a trader who is paid his debt in the customary course of business, by the man who owes it, and

with whose embarrassments he is wholly unacquainted. It is contended that such a protection is intrinsically just, and is of great consequence to the trading classes; and I observe that the Chief Judge considers that the proviso, interpreted as securing that protection, is quite as important for the public interest as the antecedent enactment that a trader, unable to pay his debts with his own money, giving a preference to a particular creditor, should be held to commit a fraud.

I observe also, that the construction, adopted by His Honour the Chief Judge, and approved by the Lords Justices, which we are asked to condemn, has been acted on for years, and those learned Judges seem to deny that any serious evil has resulted from it to the commercial community; a statement which may dispel apprehension as to the dangers alleged to attach to that construction.

But, be this as it may, looking to the probable policy of the Act, we have at least a balance of advantage and disadvantage on the one side and the other; and *à priori* each of the conflicting constructions would appear to have much to be urged in its favour. We must, therefore, consider the language of the proviso without preconception or speculation as to the motives of its framers; and, so regarding it, I think that the creditor in this case must be taken to be the "payee" whom it was intended to protect. The debtor made the payment, and the creditor to whom it was made was the "payee," that is the person accepting the payment.

I see no reason for putting on the word any other than its plain and natural meaning; and the suggestion made at the Bar that it should be held to describe a third person to whom the creditor has transferred a bill or other security for the payment of his debt, seems to me untenable. It is not necessary to determine whether such a third person might not possibly be comprehended within the description of a "payee," it is enough to say that there is nothing to make it apply exclusively to such a person, or prevent its more natural application to the creditor directly receiving payment for himself.

If we do not adopt the suggestion to which I have referred, I have heard no other giving any effect to the word "payee," which is consistent with the Appellant's case. As to the argument

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arising on the expression "for valuable consideration," it seems to me sufficiently met by the cases to which the Lords Justices advert; and, on the whole, feeling no pressure from any assumptions as to the supposed policy and the possible operation of the statute, and dealing with the words as I find them, I think your Lordships will be warranted in adopting the only construction which appears to me capable of satisfying the terms of the proviso and carrying it into practical effect.

Therefore, my Lords, I am of opinion, that the judgment of the Lords Justices should be affirmed.

LORD SELBORNE:—

My Lords, the judgment of your Lordships, concurring as it does with that of the Lords Justices and the Chief Judge in Bankruptcy, is probably correct; and it will of course settle the law.

For my own part, I am bound to say that I have felt (more than the rest of your Lordships appear to have done), that the construction of the 92nd section of the Act of 1869 which your Lordships think necessary, opens a very wide door to frauds upon the bankrupt law; every voluntary preference of favoured creditors by an insolvent debtor, upon the eve and in contemplation of bankruptcy being (as I conceive) in its own nature, and not merely by positive law, a fraud upon the administration in bankruptcy.

After a careful consideration of the 92nd and the 95th sections, I have been unable to satisfy myself that it was really the intention of the Legislature, in such cases, to give effect to preferences, by the debtor, of favoured creditors (being creditors for valuable consideration) as against the principle of equal distribution in bankruptcy, merely on the ground of passive good faith on the part of such favoured creditors. The 95th section seems to me to be that which was intended to draw the line between these *bonâ fide* dispositions of the bankrupt's property, by payments or otherwise, which ought generally to be protected, and fraudulent preferences; and I should have been myself very much disposed to think that the words "a purchaser, payee, or incumbrancer, in

good faith and for valuable consideration," in the 92nd section, might properly be construed as requiring, to constitute the "rights" thereby intended to be saved, not merely passive good faith on the part of any creditor for value, but some distinct consideration for the purchase, payment, or incumbrance,—distinct (I mean) from the original debt; and which new consideration might proceed either from the creditor himself or from any person claiming (in good faith) under him. The old law, as to the effect of preference by the creditor, remaining unchanged, and *bonâ fide* payments and dispositions of property by the debtor being protected by the 95th section, such a construction of the 92nd section would have appeared to me to do full justice to the creditor in every other case in which his protection could be reconciled with the principles and objects of the law of bankruptcy.

Order appealed against affirmed, and appeal dismissed with costs.

Lords' Journals, 12th July, 1875.

Solicitors for the Appellant: *Pritchard & Son.*
Solicitors for the Respondent: *Pritchard, Englefield, & Co.*

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July 12.

HELEN JANE CODRINGTON . . . . APPELLANT;

AND

SIR WILLIAM JOHN CODRINGTON AND OTHERS . . . . . } RESPONDENTS.

Marriage Settlement—Coverture—Dissolution of Marriage—Election.

3 C.L.D. 271.
18 C.L.D. 539.
22 C.L.D. 266.

A case of election may arise where a lady marries while an infant, and after her marriage, and after she has become of age, joins in a settlement where property of her husband is settled by him, and property of her father is settled by him, and property in which her father has a life interest, and in which she has an absolute interest in reversion, are all settled together on the trusts of the marriage, and she becomes *discoverte* and then claims the reversionary property independently of the settlement.

In contemplation of an intended marriage between *H. J. C.* and Miss *S.* it was agreed that certain property belonging to the lady's father, and also property of her intended husband, and a sum of 80,000 Sicca rupees in which the lady's father and mother (by the settlement made on their marriage) had life interests, and which was to belong to her absolutely after their deaths, should be settled to the uses of the marriage. No ante-nuptial settlement was made. Miss *S.* was then under age. The marriage took place. After she attained her majority a post-nuptial settlement was executed. Her husband, herself, and her father, were parties to it. The husband and the father respectively brought property into the settlement in which the husband and wife were to take life interests, and the sicca rupees to which she was entitled, in reversion, for her separate use, were settled to the like trusts. The settlement stated that the lady had agreed that they should be so settled, and the husband covenanted to ratify her settlement of them, but there was no absolute covenant on her part to that effect. Before the reversion fell into possession the marriage was dissolved by the decree of the Divorce Court. When it did fall into possession the lady claimed the rupees as her absolute property, coming to her under her father and mother's marriage settlement:—

Held, that as the post-nuptial settlement on her own marriage shewed that the rupees had formed part of the consideration for the settlement therein of the other property, from which she had derived benefit, she must elect to take under or against it.

A special order directing how the accounts under the election were to be taken.

IN 1824 a marriage took place between *Christopher Webb Smith* and *Anne Mackenzie*, and a settlement was then executed by which it was declared that certain trustees should stand possessed

of 80,000 sicca rupees, to invest the same for the use of *C. W. Smith* for life, and after his decease to his wife for life, and after the death of the survivor of them on the usual trusts for children, and if there should be an only child, and that only child should be a daughter, to her at twenty-one or marriage. There was but one child of the marriage, a daughter, the present Appellant, who was born on the 4th of May, 1828.

On the 9th of April, 1849, and therefore shortly before the daughter was of age, she, the Appellant, married *Henry John Codrington* then a captain in the Navy. No settlement was made before this marriage. On the 31st of March, 1850, a post-nuptial settlement was executed, the parties to it were *Henry John Codrington* and *Helen Jane* (the present Appellant) his wife, of the first part, *Christopher Webb Smith* of the second part, and the trustees of the third part. This settlement recited that of 1824, and that it was agreed that two sums of £6213 and £4652 3¼ per cents., the property of *Henry John Codrington*, transferred to the trustees, "as also the interest of the said *Helen Jane or* of *Henry J. Codrington* in her right under the settlement of 1824, should be settled on the trusts and in the manner thereinafter mentioned." And *C. W. Smith* agreed to transfer nine shares then standing in his name in the *Bank of Bengal* into the names of the trustees, and to make up each year during the lives of the said *H. J. Codrington* and *Helen Jane* and the survivor of them such a sum as, together with the dividends on the bank shares, would make the annual sum of £400." And it was witnessed that in performance of the agreement, "and in consideration of the premises, and for divers other good causes and considerations him *C. W. Smith* thereunto specially moving," he entered into a covenant to that effect. These various funds were to be held on the following trusts:— As to the £6213 0*s.* 3*d.* and the £4562 10*s.* 1*d.* Consols and Reduced £3 per Cents. to pay the income to *H. J. Codrington* for life, then to his wife for life, and as to the *Bengal* shares, to pay to the husband one moiety, and the other moiety to the wife "for her separate use, without power of anticipation," and the whole to the survivor for life, then to the children in such manner as the husband and wife jointly, or the survivor, should appoint. And lastly it was witnessed that "in performance of the agreement, and

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in consideration of the premises, she, *Helen Jane Codrington*, with the full privity of the said *Henry John Codrington* (testified by his being a party to and executing these presents) doth bargain, sell, assign, transfer, and set over, and the said *Henry John Codrington* doth assign, ratify, and confirm unto" the trustees "all the right, title, interest, possibility, property, claim, and demand whatsoever, both at law and in equity, of the said *Helen Jane Codrington, or* of the said *Henry John Codrington* in her right," under the settlement of 1824, in the sum of 80,000 sicca rupees thereby settled, to receive the interest (subject to the life interests of *C. W. Smith* and his wife) upon the trusts thereinafter declared.

The marriage between the Appellant and her husband, who had become Sir *Henry John Codrington*, was dissolved by a decree of the Divorce Court on the 2nd of May, 1865. There had been two daughters issue of the marriage.

Mrs. *Smith* died some years ago, and her husband, Mr. *Christopher Webb Smith*, died on the 18th of January, 1871.

A question then arose as to the title to the 80,000 sicca rupees. The Appellant required the trustees under the settlement of 1850 to transfer the rupees to her. They refused to do so, and on the 20th of October, 1871, she filed her bill against Sir *Henry John Codrington*, the trustees, the children, and all other necessary parties, praying that the assignment by her in the deed of 1850 of the said 80,000 sicca rupees might be declared wholly inoperative, and that she might be declared absolutely entitled to the same. The answers of some of the Defendants raised the question of election.

Evidence was taken, and the cause came on before Lord *Romilly*, M.R., who, on the 29th of July, 1872, made a decree declaring the Appellant absolutely entitled to the fund, and directed the transfer as required.

On appeal, this decree was, on the 5th of May, 1873, ordered, by Lord Chancellor *Selborne* and the two Lords Justices, to be varied, and it was declared that she was bound to elect whether she would take under or against the settlement of 1850, and that if she elected to take against it, she was entitled to the fund representing the 80,000 sicca rupees, subject to her making good thereout (and in priority to the incumbrances she had made on

the same), for the benefit of the persons interested under the trusts, the income of the funds remaining subject to those trusts (1).

The Appellant, thus compelled, elected to take against the settlement; but she brought this appeal against the decision of the Lord Chancellor and the Lords Justices.

Mr. *Dickinson*, Q.C., and Mr. *Beaumont*, for the Appellant:—

The cases on which is founded the doctrine of election do not apply here. In all of them there are two existing classes of benefits, arising from the act of a donor, or from contract, which are inconsistent with each other, or two classes of benefits, created by the contract of a particular person, not intended to be enjoyed together, and so, when particular circumstances arise, election becomes necessary. Nothing of that kind exists here. In the first place, the Appellant had in 1850 no power to enter into a contract, for she was a married woman, and the contract that was made, whatever it was, was a contract only between her husband, her father, and the trustees; and it was a contract by them for her benefit, and not one that was at any time to be used against her. Her right to the rupees was only a reversionary right. She had no power to surrender it, nor had any one else any power to take it away from her.

In the next place, there were no two inconsistent advantages which created the necessity for an election between them. All the funds settled were settled for the benefit of the married couple, and there was no intention that she should only be entitled to the benefit of part of those funds, and certainly none that she should be compelled to choose which of them she should accept, and which reject. There was no idea of an election at all, and the parties who executed the settlement had no power of imposing on her the necessity to make the election. At all events, her right to the sicca rupees was complete, and could not be interfered with. She had a vested right in them by virtue of the settlement of 1824, and no one had the power to deprive her of that right. And she had done nothing to deprive herself of it.

The words of the settlement of 1850 did not interfere with her

(1) *Nom. Codrington* v. *Lindsay*, Law Rep. 8 Ch. Ap. 578.

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right. All that they related to was the right which the husband could exercise over them when, in virtue of her right, they fell into his possession by the termination of the life estates of her mother and father.

The interest which was now sought to be affected was a reversionary interest; and as a married woman she had no power to enter into a contract to dispose of it. It was a reversionary interest dependent on the lives of her mother and her father. Her mother died, but her father survived; and in May, 1865, while her father was still alive, her marriage was dissolved. That remitted her to the rights she possessed before her marriage. Her father survived till 1871, and on his death, her title to the property absolutely secured to her under the deed of 1824, fell into possession. It was an absolute, indefeasible title. In October, 1871, she filed her bill claiming these 80,000 sicca rupees. In the first instance it was insisted that under the deed of 1850 the husband took the first life interest and the wife only the second. But the answer to that was, that that deed, made under the circumstances under which it was made, did not bind the interest of the lady. The deed was made after marriage; and though then she had attained her majority, and in that way might assent to it, she had lost the power to assent by having married. As she was an infant when she married and was a wife when this deed of settlement was made, the deed was inoperative. As a married woman she could not enter into a contract with regard to any property which did not belong to her for her separate use. That was not the case with this property. Then could it be argued that under such circumstances she could be bound by a contract which her husband and her father had made? The contract, if there was any, was theirs, not hers, and she was not bound by it. The father's property and the husband's property were settled as they pleased, not as she desired, for she had no power in the matter. The contract might be valid as between them, but could not affect her. The sicca rupees were not her father's property, they belonged to her. When the marriage was dissolved, whatever might have been its effect before (and on that point nothing was admitted), its effect was then utterly at an end. The executors of a deceased wife would in such circumstances be entitled to the fund: *Wilkin-*

son v. *Gibson* (1). In that case, the circumstances of which exactly resemble the present, it was said by Vice-Chancellor *Wood* (2) that "the settlement was a very good settlement as far as the husband was concerned, but I must treat it as an absolute nullity with regard to any matters in which the interests of the wife were concerned. This Court will not allow a woman to bind her reversionary interests except in cases provided for by the Act of Parliament, and I must therefore lay the settlement out of the case, and consider the question as one of the reversionary interest of a married woman, which was not reduced into possession because the tenant for life lived to a date subsequent to the divorce."

In the judgment in the Court below, the Lord Chancellor said that he put aside all the cases that depended on wills, but in fact judgment proceeded on the principles and rules which they had furnished.

Willoughby v. *Middleton* (3), though relied on in the judgment in the Court below, does not decide this case; for there the intended wife entered into a positive covenant to settle after-acquired property, and her intended husband covenanted to join in such settlement. That was not so here; there was no covenant but that of the husband. The distinction between the two cases is therefore plain.

There is no case where the doctrine of election has been applied where the benefit has been derived from property not bound by the agreement itself. Here it could not be bound: the father could not bind it, for it was the reversionary property of the daughter; the husband could not bind it, for he could have no right to it till it fell into possession, under his wife's right, on the death of the father; the wife could not bind it, for not only was it reversionary, but she was a married woman. It was therefore impossible to carry out the terms of the settlement in the way in which those terms were expressed. The settlement might be binding where it was well made, but it was not therefore binding where it was altogether ill-made and defective, and consequently the case of *Brown* v. *Brown* (4), relied on in the Court below, did

(1) Law Rep. 4 Eq. 162.
(2) Ibid. at p. 169.
(3) 2 J. & H. 344; 31 L. J. (Ch.) 683.
(4) Law Rep. 2 Eq. 481.

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not apply. There the daughter had no title whatever, except under the contract between the parties under whom she claimed. There was no valid contract here, and her own title was absolute.

There was here no intention to dispose of all her property expressly manifested, and none could be implied. Even Lord *Redesdale's* opinion in *Birmingham* v. *Kirwan* (1), relied on in the Court below, shewed that in all cases but those of wills there must be a contract. That was a case where the question arose on the wife claiming dower, the property out of which it was to come being devised to her by her husband for her life, and she had elected to take under the will. On the question of the principle which was to govern such a case, Lord *Redesdale* said (2) that where there is a clear legal right "an intent to exclude that right by voluntary gift must be demonstrated either by express words, or by clear and manifest implication. If there be anything ambiguous or doubtful—if the Court cannot say that it was clearly the intention to exclude," so as to make a case of election, the pretence of election could not be supported. The case of *Chetwynd* v. *Fleetwood* (3), for the same reason, does not apply here, for there a clear contract had been made by a person capable of making it, creating the benefit that was afterwards claimed by the heir of the party who entered into it.

As to the probability of intention, it cannot be believed that when the father was making a provision for his daughter, he intended that that provision should be diminished, by taking from it more than the partial benefit she would receive from it in common with her husband.

Mr. *Chitty*, Q.C., and Mr. *A. T. Watson*, were not called on to address the House.

THE LORD CHANCELLOR (Lord *Cairns*):—

My Lords, the facts of this case are extremely simple. The Appellant, *Helen Jane Codrington*, or *Smith*, was born on the 4th of May, 1828, and on the 9th of April, 1849, she married the Respondent, Sir *Henry Codrington*. She was, therefore, at the

(1) 2 Sch. & Lef. 444. (2) 2 Sch. & Lef. 452.
(3) 1 Bro. P. C. (8vo.) 300.

time of her marriage, an infant under age. Under the settlement made on the marriage of her father and mother, she was entitled in the event, (which happened,) of there being no other children of that marriage, to a sum of 80,000 sicca rupees, subject to the life interests of her father and mother. There was no settlement at the time of her own marriage of this sum, or of any other property; but about a year after her marriage a post-nuptial settlement was executed, in which were included this sum of sicca rupees, and also some moneys and property coming from the father of the Appellant, and from Sir *Henry Codrington*. The interest of the Appellant in this sum of sicca rupees being, at the time of the post-nuptial settlement, a reversionary interest of a married woman, she could not be bound by it so as to prevent her claiming the money as her own when she became *discoverte*. Accordingly, her marriage with Sir *Henry Codrington* having been dissolved on the 2nd of May, 1865, a bill in Chancery was filed by her against the trustees of the settlement and the children, praying that the trusts of the settlement might be carried into execution, but that it might be declared that the settlement was inoperative as to the 80,000 sicca rupees, and that that sum might be transferred to the Appellant by the trustees of the settlement.

In opposition to this claim the trustees of the settlement contended that the Appellant ought not to be allowed to claim both under the settlement and against the settlement, and that, if she insisted upon taking out of the settlement the sicca rupees, she must give up the other benefits which the settlement conferred upon her. It was argued at the hearing, that any objections which might be taken to the form of the suit should be waived, in order that this question might be decided, and the Lord Chancellor and the Lord Justices, reversing a decision of the late Master of the Rolls, have decided that the Appellant must elect between the sicca rupees and the other benefits given her by the settlement, and the present appeal is brought against that decision.

By the well-settled doctrine which is termed in the Scotch law the doctrine of "approbate" and "reprobate," and in our Courts more commonly the doctrine of "election," where a deed or will professes to make a general disposition of property for the benefit of a person named in it, such person cannot accept a benefit under

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the instrument without at the same time conforming to all its provisions, and renouncing every right inconsistent with them. The authorities on this branch of the law are very fully referred to in the judgment given in this case (1) by my noble and learned friend who was then Lord Chancellor, and they were considered not long since in this House in the case of *Cooper* v. *Cooper* (2).

The principle of these cases, indeed, was not disputed at your Lordships' Bar; but the argument on the part of the Appellant endeavoured to take this case from under their operation by shewing that on the construction of the post-nuptial settlement it was not intended to include the right which the Appellant might have to the sum of sicca rupees in the event of her becoming *discoverte*, but only that interest in or power over the sum which her husband would have supposing it fell into possession during the coverture. The question, therefore, becomes one upon the construction of the settlement, and I proceed to call your Lordships' attention to its terms.

The parties to the settlement are, first, Sir *Henry Codrington*, and the Appellant, second, the father of the Appellant, and, third the trustees of the settlement. It recites that Sir *Henry Codrington* was entitled to a sum of £6213 consols and £4562 Reduced 3 per Cent. Annuities. It recites the settlement under which the Appellant was entitled to the 80,000 sicca rupees. We then find a recital, which I will read as it stands in the deed: "Whereas upon the treaty for the marriage of the said *Henry John Codrington* and *Helen Jane Codrington*, now his wife, it was agreed that as well the two several sums of £6212 0*s.* 3*d.* £3 per cent. Consolidated Bank Annuities, and £4562 10*s.* 1*d.* £3 per cent. Reduced Bank Annuities, as also all the interests of her the said *Helen Jane Codrington, or* of the said *Henry John Codrington* in her right under or by virtue of the said recited indenture of settlement" (that is the settlement settling the 80,000 sicca rupees) "should be settled upon the trusts and in the manner hereinafter mentioned."

My Lords, I pause here for the purpose of making two observations upon this recital. In the first place the recital speaks of the interest of the Appellant or of Sir *Henry Codrington* in her right

(1) Law Rep. 8 Ch. Ap. 578. (2) *Ante*, p. 53.

under the original indenture of settlement, and this connection of the alternative interests by the conjunction "or" is the ordinary and apt mode by which an interest such as that under consideration is described, when it is intended to comprehend either and both of the titles under which it may be claimed. It is, in fact, equivalent to saying that it had been agreed that the interest of the Appellant, should she become the owner, and the interest of Sir *Henry Codrington*, should he become the owner of the sicca rupees, should be settled.

In the second place it is unnecessary to consider whether this recital can or cannot be taken as proof of what was agreed upon before the marriage. It is quite sufficient for the present purpose if it shews, as it clearly does shew, what was the mind, and what was the intention, at the time this settlement was executed, of those parties to it from whom the property, other than the sicca rupees, was derived.

The settlement then proceeds to recite that the father of the Appellant had agreed to transfer nine shares belonging to him in the *Bank of Bengal* into the names of the trustees, and also to make up during the joint lives of himself and the Appellant and Sir *Henry Codrington*, and during the joint lives of himself and the survivor of them, such a sum as with the dividends on the bank shares would make up the annual sum of £400. The shares and the annual sums were to be settled on the trusts of the settlement. The indenture then declares trusts, which I need not enumerate particularly, for the benefit of the husband and wife and the children of the marriage, of the sums of Consols and Reduced Annuities and the shares in the *Bank of Bengal*. The indenture then continues in these words: "And this indenture lastly witnesseth that in pursuance and performance of the said agreement in this behalf contained, and in consideration of the said premises, she, the said *Helen Jane Codrington*, with the full privity of the said *Henry John Codrington* (testified by his being a party to and executing these presents) doth bargain, sell, assign, transfer, and set over, and he, the said *Henry John Codrington*, doth assign, ratify, and confirm unto the said *William John Codrington*, *Lionel Ames Alexander Colvin*, and *John Cowie*, their executors, administrators, and assigns, all that the right, title, interest, possibility,

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property, claim, and demand whatsoever, both at law and in equity, of her the said *Helen Jane Codrington*, or of the said *Henry John Codrington* in her right, under or by virtue of the said recited indenture of settlement of the 17th of August, 1824, of and in the said sum of 80,000 sicca rupees thereby settled, and of and in the stocks, funds, and securities in or upon which the same sum, or the produce thereof, may now or at any time or times hereafter be laid out and invested, and of and in the interest, dividends, and annual produce thereof, and all and singular other (if any) the interests of her the said *Helen Jane Codrington*, or of the said *Henry John Codrington* in her right, under or by virtue of the said recited indenture of settlement of the 17th day of August, 1824, to have, hold, receive, and take the interests and premises hereinbefore assigned, or intended to be (subject nevertheless to the intended life interests of the said *Christopher Webb Smith* and *Anne* his wife therein), unto the said *William John Codrington*, *Lionel Ames Alexander Colvin*, and *John Cowie*, their executors, administrators, and assigns, in as full, ample, beneficial a manner, to all intents and purposes, as she the said *Helen Jane Codrington*, or the said *Henry John Codrington* in her right, held or was entitled to the same immediately before the execution of these presents; but nevertheless upon and for the trusts and intents and purposes, and with, under, and subject to the powers, provisoes, agreements, and declarations hereinafter declared and contained of and concerning the same."

The trusts declared are to be the same as those before declared for the benefit of the husband and wife, and the children of the marriage, the ultimate trust in default of children being the same as the ultimate trust declared concerning the *Bank of Bengal* shares.

My Lords, I think it perfectly clear, from the words which I have read, that the settlement made of the property other than the sicca rupees was in consideration of the settlement made of the sicca rupees, and that the settlement professed to be made of the sicca rupees was the settlement of every interest in it after the death of the tenants for life, whether that interest was the interest of the Appellant or of Sir *Henry Codrington*. It is quite true that, so far as the interest of the Appellant was concerned, the settlement was ineffective. She had it in her power, when *discoverte*, to repudiate it, and to stand upon her original rights, or she had

it in her power in the same event to ratify and confirm it. This power the other parties to the settlement could not take from her. But they have shewn, in my opinion, in the clearest way, on the face of the settlement, their intention and desire that the settlement should operate upon the whole of her interest, and they have made it in terms so to operate. So far as intention and construction therefore go, there appears to me to be no doubt whatever that this is a case in which we have an expression of the clearest intention, by the disponers of the other property contained in the settlement, that the property of the Appellant should be bound by and go along with the property disponed by them; and under these circumstances the general rule must be applied, and the Appellant must not be allowed to withdraw her property from the purposes of the settlement, and at the same time to claim the benefits provided for her by that settlement.

Your Lordships understand that the Appellant, being put to her election, prefers to take against the settlement, and to claim the sum of sicca rupees. The decree, therefore, after declaring that she is bound to elect, ought to contain some provision indicating that the interests provided for her out of the other items of property ought to go to make good the value of what she takes away from the settlement, and that as soon as this has been done, if it should ever be done, she will then, on the principle of having made compensation, be restored to the income provided for her by the settlement. A direction of this kind does not appear to have been asked for in the Court below, but would no doubt, if asked for, have been given. Some words which I will read to your Lordships, and which I propose should be added to the decree, have been handed in by the learned counsel, but this alteration ought not to make any difference as to the costs of the appeal. I will therefore propose to your Lordships that, with this addition, the decree should be affirmed and the appeal dismissed with costs (1).

LORD CHELMSFORD:—

I agree with my noble and learned friend, and have very little to add.

The decree in this case is no extension of the doctrine of election,

(1) His Lordship read the words proposed to be added to the decree of the Court below. See the Order at the end of the case.

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as suggested by the learned counsel for the Appellant, but strictly within the principle on which that doctrine is founded. The principle is, that there is an implied condition that he who accepts a benefit under an instrument must adopt the whole of it, conforming to all its provisions and renouncing every right inconsistent with it. It seemed to be considered in argument that the rule of the Scotch law that a person cannot approbate and reprobate under the same instrument was not altogether the same as the English doctrine of election, but Lord *Redesdale* in *Birmingham* v. *Kirwan* (1) puts them exactly on the same footing. He there says: "The general rule is that a person cannot accept and reject the same instrument, and this is the foundation of the law of election."

This case appears to me to be completely within this principle. I look upon the settlement in question as the result of an agreement between the parties to it that the different subjects of property should be, all of them, settled according to the provisions contained in the deed, the whole constituting the entire trust fund dealt with by the settlement. In this view the assignment of the wife's reversionary interest in the 80,000 sicca rupees may be regarded as part of the consideration for the provisions made for her by her father and her husband. It is true that the other parties to the settlement could not bind her interest, nor could she be bound by the deed, but it being evidently the intention of the persons who provided the other subjects of property to be settled, that the wife's reversionary interest should form an integral part of the settlement, it is a case completely within the principle of the doctrine of election, and she cannot withdraw that reversionary interest from the settlement without foregoing the provision made for her in the other settled property.

LORD HATHERLEY:—

My Lords, I entirely concur in the view which has been already expressed. I was about to cite the observations made by Lord *Redesdale* in *Birmingham* v. *Kirwan*, which have just been referred to by my noble and learned friend (Lord *Chelmsford*). At the close of the passage cited in the Court below Lord *Redesdale* observes that the question of election principally arises "in cases

(1) 2 Sch. & Lef. 449.

of wills, because deeds being generally matter of contract the contract is not to be interpreted otherwise than as the consideration expressed requires." That is exactly the point. The Court is bound to look and see whether or not the property in question, which is sought to be withdrawn from the settlement on the ground of the person who is made to convey it being incapable of joining in that conveyance, was a part of the consideration, and when you have ascertained that the whole point is determined. My noble and learned friend, the Lord Chancellor, has pointed out those passages in the settlement which shew clearly that the settlement of the other parts of the property which was settled upon this lady, was made in consideration distinctly of the settlement purporting to be made on her part, and, although of course nothing has been done or could be done by that settlement which in any way could affect her right to the property, if she chose to retain it, yet she certainly could not retain it without fulfilling the other conditions imposed by that very same instrument upon her enjoyment of it.

LORD O'HAGAN :—

My Lords, I am quite of the same opinion, and I can add nothing material to the statement of facts and law by the Lord Chancellor.

The principle which determines that there cannot be an acceptance and a rejection of an instrument, an acceptance in part and a rejection in part, seems to me to govern the case. The Respondent's claim is to take at once under the deed, and paramount to and against it. The settlement of the bank annuities and the bank shares is expressly made in pursuance of an agreement which involves and requires a like settlement of the sicca rupees upon similar trusts; and although the deed, as executed was, for reasons already sufficiently stated, invalid *quoad* the rupees, the authorities cited in the very conclusive judgment of the late Lord Chancellor (Lord *Selborne*), cast upon her the necessity of giving it effect, if she insist on the enjoyment of the benefits which were bestowed only in consideration of the assignment of the reversionary interest, which has now been reduced into possession. The agreement is integral and binding throughout, and not to be

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dealt with piecemeal, or as if its parts were not reciprocally dependent on each other, in disregard of the plain intentions of the other parties to the settlement. The Appellant cannot take the benefit without the burthen; and I am therefore of opinion that the Respondents must succeed.

The following Order was entered on the Journals:—

That the said Order of the Lord Chancellor and the Lords Justices of the Court of Appeal in Chancery, of the 5th of May, 1873, complained of in the said appeal, be varied as follows: namely, by inserting therein, immediately before the Order to take the account therein mentioned, a declaration "That the income which has been so received by the Plaintiff (Appellant), or by her order or for her use, and the subsequent income which would have been payable to her if she had not elected to take against the said indenture of settlement (in the pleadings mentioned), and all other, if any, the interest to which, if she had not so elected, she would have been entitled under the same indenture, ought to be applied in making compensation to the persons disappointed by her election, for the benefits of which they respectively have been, or will be, deprived by her election, so far as the same shall extend, and until such compensation shall be fully made:" And that the said Order, subject to the above-mentioned variation, and also the Order of the Master of the Rolls, of the 12th of August, 1873, complained of in the appeal, be affirmed with costs: And the cause, with these Orders, was remitted to the Court of Chancery.

Lords' Journals, 12th July, 1875.

Solicitor for Appellant: *W. A. Day.*
Solicitor for Respondent: *H. P. Bird.*

WILLIAM AUGUSTUS MAHONY, Public Officer of the National Bank, Dublin . } Appellant;

AND

THE LIQUIDATOR OF THE EAST HOLYFORD MINING COMPANY (Limited). . } Respondent.

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June 29;
July 1, 2, 4, 12.

Bankers—Company—Directors—Shareholders.

Bankers who have funds of a company (formed under the *Companies Act*, 1862) in their hands may, (acting *bonâ fide*,) lawfully honour the cheques of the directors of the company, signed according to a form sent by them to the bank, without being bound, previously, to inquire whether the persons pretending to sign as directors have been duly appointed to office, in conformity with the provisions of the memorandum and articles of association.

W., in concert with some friends and dependents of his, started a company called a mining company. The Memorandum and Articles of association were registered. Subscriptions were obtained from persons becoming shareholders, and these subscriptions were paid into a bank, which had been described in the prospectuses of the company, as the bank for the company. The bankers received a formal notice, signed by the person who described himself as the secretary of the company, that they were to pay the cheques signed by "either two of the following three directors," and countersigned by himself, in accordance with a "Resolution passed this day;" and the names of the three persons described as directors, and their signatures, were inclosed with the "Resolution." The bankers from time to time, while the business of the company appeared to be going on, received cheques signed and countersigned as described, and duly honoured them. When the fund had been, almost entirely, drawn out, the company was ordered to be wound up. It then appeared that there never had been a meeting of shareholders, nor any appointment of directors or of a secretary, but that the persons who had got up the company had treated themselves as directors and secretary and appropriated the money obtained from the subscriptions:—

Held, that the official liquidator could not recover from the bankers the amount of the cheques which, under the circumstances disclosed in the case, they had thus *bonâ fide* paid.

Where those who draw and those who (*bonâ fide*) honour cheques, intend them to operate on a certain account, no objection can afterwards be taken that that account is not specifically mentioned on the face of the cheques.

Per Lord Hatherley:—Observations on the duties of shareholders in a case of this sort.

THIS was a joint case on appeal stated under the provisions of the *Common Law Procedure Amendment Act* (*Ireland*), 1856.

The shareholders of the Company had (through the official liqui-

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dator) brought an action in the Court of Common Pleas in *Ireland* against the Appellant (as the public officer of the *National Bank*), and had obtained a verdict, which the Court of Common Pleas had directed to be set aside (1), and to be entered for the Appellant. The Exchequer Chamber had reversed that decision (2).

The object of the action thus brought was to recover the sum of £3970, which had been lodged in the *National Bank*, and had been standing to the credit of the *Mining Company*.

The facts, as stated in the report of Lord Chief Justice *Monahan*, before whom the case was tried, and whose Report was treated as the statement of a Special Case, were these: Before July, 1866. *Erwin Harvey Wadge* was the proprietor of a publication called *The Industrial Magazine*, published in *Dublin*. He had several persons in his employment, all described as in humble circumstances, among whom were *Augustus Tully*, *Francis McKenna*, *John Murphy*, and *Arthur Edward Hughes*.

Wadge, in the early part of July, determined to form a "limited" liability company to be called the *East Holyford Mining Company*. Two of his friends, Mr. *Hoare* and Mr. *Wall*, joined him in the scheme. An agreement was prepared, in which it was stated that they whose names were thereunto subscribed, were desirous of forming the company, in pursuance of a memorandum of association, also prepared, and that they respectively agreed to take the number of shares set against their names. The signatures to the memorandum and to the articles of association, the descriptions added to the names of the persons who signed (they all resided in *Dublin*), and the number of shares taken, were as follow:—

"*John Hoare*. . . .	Gentleman . . .	25 shares.
Charles H. Wall . .	Accountant . . .	5 shares.
Augustus Tully . . .	Solicitor (3) . . .	1 share.
Francis McKenna . .	Gentleman . . .	1 share.
John Murphy . . .	Gentleman . . .	1 share.
Arthur Edward Hughes	Gentleman . . .	1 share.
Thomas McNally . .	Clerk, *Trinity College*, *Dublin*	25 shares."

(1) 5 Ir. Com. Law Rep. 508.
(2) 7 Ir. Com. Law Rep. 69.
(3) According to his own evidence, his occupation was that of soliciting for advertisements for newspapers.

The "witness to the above signatures" was "*John J. Cummin*, of *Brunswick Street, Oxford Road, Manchester.*"

The Memorandum and Articles of association were registered. *Wadge* did not sign them, and never appeared to have subscribed for shares.

The Chief Justice gave a statement of what persons these were whose names were signed to the memorandum. It is only necessary to notice one, Mr. *McNally*, who appeared to have been "a teacher" in *Trinity College, Dublin*, and to have acted in that capacity in preparing *Wadge* to enter the college in 1863–4. He gave evidence at the trial, and stated that he signed the agreement at the request of *Wadge*, that he was not aware he was ever appointed, or in fact was, a director of the company; that he never knowingly acted as such; that he never attended any meeting of directors or shareholders, or got any notice of any such meeting; that the only act he did in relation to the company was signing such cheques (generally in blank) as were sent, or brought to him for his signature, by *Wadge*, and thought he did so as a shareholder.

Numbers of the papers relating to the company were circulated and were sent to *England*, and many persons applied for shares and lodged deposits, and some paid calls. In this way a sum of nearly £4000 was collected.

The money thus obtained, forming the capital of the company, was paid into the *National Bank* in *College Green*, with which an account was opened on the 30th of June. The manager of the bank afterwards received the following note:—

"12, *Grafton Street, Dublin*,
"July 21, 1866.

"*The East Holyford Mining Company.*

"Sir,—Subjoined I beg to hand you a copy of a resolution passed this day relative to the banking account. Mr. *Wadge's* and Mr. *McNally's* signatures accompany this, and Mr. *Hoare's* will be sent as soon as he returns on Monday,

"Yours faithfully,
"*Charles H. Wall*,
"Secretary."

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The "Resolution" which accompanied the note was in these terms:—

"That the *National Bank* be requested to pay all cheques signed by either two of the following three directors, viz., *Thomas McNally*, *Erwin Harvey Wadge*, and *John Hoare*, and countersigned by the secretary.

"Signatures attached,

"*E. Harvey Wadge*,

"*Thomas McNally*."

These were the genuine signatures of these two persons. In a few days afterwards *Hoare's* signature was in like manner sent to the bank.

Shortly afterwards several cheques, some of them for large sums, were sent, generally payable to *Wadge*, and signed by two of the three persons named in the alleged resolution, and the cheques were countersigned by *Wall* as secretary.

McKenna, *Murphy*, *Hughes*, and *Tully* proved that no meeting of shareholders was ever held, or even summoned; that *Wadge*, *Hoare*, and *Wall* were in constant attendance at the office of the company in *Grafton Street*, and transacted all the business done there. The name of a Mr. *Lewis*, a respectable solicitor of *Dublin*, had been inserted in one of the prospectuses as a director of the company, but as soon as he knew of it he sent a remonstrance, and it was withdrawn. He never had had anything whatever to do with the company.

Clause 2 in the articles of association authorized the directors to adopt a contract made by *Wall* and *Hoare* for the purchase of a certain mine called the *East Holyford Mine*, "situate in the parish of *Clonalty*, barony of *Kilnernaugh*, and county of *Tipperary*, and all right and interest of the lease in the said mine for the sum of £10,000." *Wadge* was the owner of this lease.

By clause 52 the number of directors was not to be less than three, nor more than five, unless a general meeting should otherwise direct.

By clause 53 the first seven persons who signed the articles were to appoint the directors. Every director was to hold at least twenty-five shares in his own right.

By clause 58 the banking account was to be kept in the name of the company, and every sum exceeding £10 was to be paid on a cheque signed and countersigned as might be directed by the board.

By clause 82 the directors might delegate any of their powers to a committee consisting of such number of members as the directors might think fit.

By clause 85 "All acts done by the board or by a committee of directors shall, notwithstanding that it be afterwards discovered that there was some defect in the appointment of any such directors, or persons acting as aforesaid, or that they or any of them were or was disqualified, be as valid as if every such person had been duly appointed, and was qualified to be a director."

All the money paid into the bank had been drawn out, except about £55, on cheques drawn, signed, and countersigned as required by the resolution.

The company was ordered to be wound up, and the official liquidator, on behalf of the shareholders who had paid in subscriptions, brought an action against the bankers to recover the money which had been paid into the bank on account of shares in the company. The defence set up was that the money had all, except the £55, been duly paid out on cheques of the directors, and the bankers paid over this sum of £55 to the official liquidator.

At the trial of the cause before Lord Chief Justice *Monahan*, it was contended for the Plaintiff that there had been no sufficient authority for the payments on the cheques, for that there was no evidence that *Wadge, Hoare,* and *McNally* had been duly appointed directors. The Chief Justice left certain questions for the jurors, who "found that no four of the seven persons who had signed the articles of association ever agreed to the appointment of directors, or assented to *Wadge, Hoare,* or *McNally* acting as such; that no such resolution was passed as stated by *Wall* in his letter to the bankers; and that, in fact, no meeting of directors was ever held, but that the bankers acted altogether on the faith of *Wall's* letter, believing it to be accurate."

The counsel for the Defendant insisted that on this evidence and

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the findings the Lord Chief Justice ought to direct the jury that the bankers were not responsible, but his Lordship declined to adopt that course, and a verdict was taken for the official liquidator for £3970, but liberty was reserved to have the verdict entered for the bankers.

A rule was accordingly obtained, and on cause shewn was made absolute, but this judgment of the Court of Common Pleas was reversed in the Exchequer Chamber, and the verdict ordered to be entered for the liquidator for the sum found. The cause was then brought up to this House.

The Judges were summoned and Lord Chief Baron *Kelly*, and Justices *Blackburn*, *Mellor*, *Brett*, and *Grove*, and Baron *Pollock* attended.

Mr. *Benjamin*, Q.C., and Mr. *T. W. Wheeler*, for the Appellant, the public officer of the bankers:—

The judgment of the Court of Common Pleas was right, and must be restored. The payments made by the bankers were made on what they were bound to treat as due authority. They had no power and were under no obligation to inquire into the appointment of the directors. They had received money under the apparent authority of those directors, and were bound to hold it as bankers on their account, and to pay it back on their order. They were formally told how the orders to pay would be given, how the cheques would be drawn and signed, and they had obeyed the orders and honoured the cheques authenticated in the manner described. They would have been liable to an action for refusing to pay. They were therefore discharged from all liability when they had thus obeyed the regularly drawn orders to pay. If there was any irregularity in the proceedings of the directors it was for the shareholders, not for the bankers, who for such a purpose were strangers to the company, to correct that irregularity.

At the office in *Grafton Street* the persons described as directors were, while the company went on, always in attendance, and always appeared to exercise the authority of directors. There was therefore every outward appearance of regularity in the conduct of the

business of the company, and the shareholders, who might themselves have prevented all the irregularities, but who allowed them to go on unchecked, were not now entitled to say that the bankers ought to have made inquiries as to the internal arrangements of the company, but were estopped from setting up those irregularities as a ground of claim against others: *Royal British Bank* v. *Turquand* (1); *Riche* v. *Ashbury Company* (2); *Carr* v. *London and North Western Railway Company* (3).

Mr. *A. E. Millar*, Q.C., and Mr. *Thomas Webb*, Q.C. (of the Irish Bar), for the Respondent, the official liquidator of the mining company:—

The shareholders whose money had been paid into the bank and had been allowed by the bankers to be drawn out, were innocent victims of a fraud; they had no means of helping themselves. If the bankers had used due caution, and made proper inquiries, they could have ascertained the truth, and would then have found that there had been no meeting of shareholders, nor any appointment of directors, and that the persons who pretended to assume that character had no authority to do so. The principle contended for by the other side was most dangerous—it offered a premium to negligence; it went to this extent, that if a mere stranger went into a bank and represented himself as entitled to draw cheques for a particular company, and went through the formality of giving his signature, the bankers would be relieved from liability to the real owners of the money if they duly honoured his cheques. The letter of *Wall* is no authority whatever; it is true it speaks of a resolution passed, but it does not even affect to say that it was a resolution passed at a board of directors, or passed by directors at all. That ought to have put the bankers on inquiry. *Wadge* here never was a shareholder of the company, and never had been appointed a director, and *McNally* proved that he had never intended to act as such. *Wadge* and *Wall* were the only two persons who really knew any-

(1) 6 El. & Bl. 327. (2) Law Rep. 9 Ex. 224; Ibid. 7 H. L. 653.
(3) Law Rep. 10 C. P. 307.

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thing of the matter. It was highly improbable that the bankers could have been ignorant of all these circumstances, but at all events they had taken no trouble to inquire. Mr. *Lewis's* name had been at one time published as that of a director. The bankers might have inquired of him, a respectable solicitor of *Dublin*, and then they would have obtained full information on the subject. Lord *Wensleydale* in *Ernest* v. *Nicholls* (1) had distinctly and expressly declared that it was the duty of persons dealing with directors to make themselves acquainted with the deed of association and the provisions of the statute, and if they did not choose to do so, but gave credit to "any unauthorized persons, they must be contented to look to them only and not to the company at large." Vice-Chancellor *Wood* in *Re The Athenæum Life Insurance Society* (2) adopted and enforced that principle. The bankers here not having taken any trouble on the matter, they had paid away the money to persons not entitled to receive it, and so made themselves liable to bear the loss. It is admitted that if persons were appointed as directors, and appeared to act as such, but it was afterwards discovered that their appointment had only been irregularly made, those who *bonâ fide* dealt with them in that character would be protected, but that could not affect a case where there had been no appointment at all.

What was done here being entirely without authority was not binding on the shareholders, whose money was deposited with the bankers. Even where a partial authority exists, but is wrongfully exercised, it is good for nothing. An agent of a wharfinger had authority to give receipts for goods actually delivered at a wharf, he fraudulently gave a receipt for goods which had not been delivered, his principal was held not to be responsible: *Coleman* v. *Riches* (3). Mr. Justice *Cresswell* thus expresses the principle: "There was no general authority, nor anything from which the parties had a right to assume there was such an authority." Here the bankers, without any right to do so, assumed that the persons who signed the cheques had authority to sign them. That assumption was wholly unwarranted. The persons who signed

(1) 6 H. L. Cas. at p. 419.
(2) 4 K. & J. 549; 27 L. J. (Ch.) 829.
(3) 16 C. B. 104; 24 L. J. (C.P.) 125.

these cheques might be personally liable upon them, but their signatures did not bind the company, which they had no authority to represent: *Kelner* v. *Baxter* (1). So in *Eyre* v. *McDowell* (2), an authority which ought to have been given at a board meeting, but, though given by the proper person, was not given at a board meeting, was treated as no authority at all. The affixing of the seal of a corporation, if done without authority, will not validate the instrument to which it is affixed: *The Bank of Ireland* v. *The Trustees of Evans' Charities* (3). In *D'Arcy* v. *The Tamar, &c., Railway Company* (4), it was held that directors exercising the powers conferred by the *Companies Clauses Consolidation Act*, 1845, must act together, and as a board, and there, as the seal of the company had been affixed to a bond by the secretary of the company, who affixed it not at a board, but on the written authority of two directors at a private interview, and the verbal promise of a third to sign the authority, the bond was held to be invalid. That was a much stronger case than the present, for there all the parties had authority to do what they did, though not in the form in which they did it, while here, not one of the parties signing the cheques had been invested with any authority whatever. In that case Mr. Baron *Channell* said it must be assumed *primâ facie* that the seal was properly affixed, but that the parties to be charged with liability might shew that it was not properly affixed, and as they had done so, the judgment must be for the Defendants. Such evidence had been given here, and had really been affirmed by the finding of the jury. The cases where the loss has been occasioned by the negligence of the parties seeking to obtain compensation do not apply here, for the shareholders who subscribed the money had no means of knowing the manner in which the business of the company was transacted. But the bankers had those means and ought to have employed them. No question of ratification could be introduced here; these shareholders had in no way whatever ratified what had been done, or in any way contributed to the loss.

There were some of these cheques that did not even contain the

(1) Law Rep. 2 C. P. 174. 12 Jur. N.S. 1014
(2) 14 Ir. Com. Law Rep. 314.
(3) 5 H. L. Cas. 389.
(4) Law Rep. 2 Ex. 158. 12 Jur. N.S. 574

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name of the company (1). That was a great irregularity, and there was no excuse for the bankers paying a cheque in that defective form.

Mr. *Benjamin* replied.

THE LORD CHANCELLOR proposed the following question to the Judges:—

Whether, upon the report of the Lord Chief Justice of the Court of Common Pleas in *Ireland*, and the shorthand writer's notes of the evidence, so far as such evidence ought for the purposes of that report to be taken into consideration, a verdict ought to be entered for the Plaintiff for the sum of £3970, or any part of that sum, or for the Defendant?

The Judges asked time to consider.

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July 6.

THE LORD CHIEF BARON (Sir *Fitzroy Kelly*):—

My Lords, we answer the question put to us by your Lordships by saying that, in our opinion, the verdict ought to be entered for the public officer of the bank.

It may be as well, before stating what we think is the result of the findings of the jury, the reservation, and the evidence, to state what we consider to be the real issue between the parties; for in the argument at your Lordships' Bar, and, with all due deference to the Judges of the Irish Court of Exchequer Chamber, in some of the judgments below, topics which we consider irrelevant to that issue have been introduced.

It was not, and could not be disputed, that, the bankers having

(1) An instance of this was the following, as given in the joint Appendix to the Case:—

"No. A. 65901. *Dublin*, July 21, 1866.

The National Bank,

Pay *E. Harvey Wadge*, Esq., or Bearer,
One Thousand Pounds.

£	s.	d.		
1000	0	0	*Thomas McNally* *E. Harvey Wadge*	Directors.
			Charles H. Wall	Secretary.

(Indorsed by)
E. Harvey Wadge."

opened an account for the *East Holyford Mining Company, Limited*, and received from time to time moneys on that account, were bound to pay the official liquidator of that company the balance in their hands, after deducting all such payments as the bankers could shew to have been made on sufficient authority from the company. The bankers paid to the liquidator £55 2*s.* 4*d.*, and asserted that as to the remainder of the moneys received by it, amounting to £3915, they had a discharge good against the company, and consequently good against the official liquidator. The account set out in the Appendix to the Case shews that a small portion of the discharge was for commissions; and so far their discharge was not disputed. But much the greater part of the discharge set up by the bankers was for payment of cheques, the earliest in point of date being drawn on the 23rd of July, 1866, and the latest in point of date on the 24th of December, 1866. At the trial it was agreed to disregard the pleadings and go to trial on the real issue.

The only real issue between the parties was whether payments made on account of these cheques were valid discharges to the bankers as against the company. A minor point was made at your Lordships' Bar as to the form of some of the cheques, on which we shall remark afterwards. But the great question, and as far as we can discover, the only question made at the trial, was whether the bankers were justified, as against the company, in honouring cheques drawn in conformity with the terms of a letter of the 21st of July, 1866, sent to the bank, purporting to be written from the office of the company, 12, *Grafton Street, Dublin*, and to be written on behalf of the company by *Charles Wall*, who signed the letter as secretary. This letter was farther authenticated by the signature of *Thomas McNally* and *Edwin H. Wadge*, who were in that letter asserted to be directors of the mining company, and on a subsequent day by the signature of *John Hoare*, who was also asserted in the letter to be a director. This letter, on which very much depends, is in these terms:—[His Lordship read it.] The jury found, and we can see no reason for doubting that it was found truly, that the bankers altogether acted on the faith of Mr. *Wall's* letter, believing it to be accurate.

If this had been all, it would not give a sufficient discharge to

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the bankers; for, no doubt, a plausible swindler might induce his dupes to believe a statement that he was secretary to a company, and that his accomplices were directors of the company, though there was no colour of truth in either assertion, and nothing done or permitted by the company to give colour to either assertion. It was therefore necessary for the bankers to prove more, and Mr. *Butt* accordingly asked the Judge to inform the jury that "the shareholders and members of the company, though ignorant of Mr. *Wadge's* proceedings, having permitted him and the others to act as they did, the bankers were justified in paying the cheques." This the Judge declined to do, but, by consent, reserved liberty to enter the verdict for the Defendant, "if the jury should have found in his favour on any questions that I ought to have submitted to them. The Court to be at liberty to draw any such inferences of fact as in their opinion the jury ought to have done."

We think that the jury ought to have been directed, in substance, that, if the shareholders and members of the company permitted *Wadge, McNally,* and *Hoare* to act as directors, to have possession of the office of the company, and of the books of the company, to transact, as directors, all such business as required to be transacted, such shareholders knowing, as from the articles of association they must have known, that from the moment the company was incorporated, directors could be appointed at once by the first seven members, or a majority of them; and that there was business which required the immediate action of directors, and such shareholders yet taking no steps themselves to appoint any directors *de jure* to transact that business;—the jury might and should find that the shareholders permitted these persons to be *de facto* in possession of the office of directors; and that if they did so they were bound, at least as to innocent third persons, by the acts of those directors *de facto,* just as if they had been regularly appointed by the majority of the seven.

We wish not to be understood as saying that all these facts are requisite to bind the shareholders; probably less would do, but as we are quite prepared, as jurors, to find that every one of those facts did here exist, we think it enough to say, as Judges, that, at least, where all those facts do exist, the company is bound by the

acts of the *de facto* directors, at least as to those who had no notice that they were not properly and duly installed in their offices.

Before pointing out the parts of the evidence on which we rely in support of our conclusions of fact, it is as well to dispose of a topic which seems to have had weight with some of the learned Judges in the Exchequer Chamber in *Ireland*, though we think it irrelevant. The company was not in existence till the 17th day of July, 1866, on which day the memorandum of association, signed by seven persons, of whom *John Hoare* and *Thomas McNally* (who were afterwards two of those acting as directors), were two, and *Charles H. Wall*, who afterwards acted as secretary, and signed the important letter of the 21st of July, 1866, was a third, was registered. On the same day the articles of association, signed by the same seven persons as subscribers, were registered. *Wadge*, who was the other person who acted as a director, was not one of the subscribers.

Up to that time nothing could be done by the company, which was not yet in existence, and the first prospectus could not be more than the prospectus of persons inviting subscriptions to an intended company of which they were promoters.

The account with the bank was opened on the 30th of June, 1866, and the bank, before the 17th of July, received in all £655, evidently on the terms that, if the company was formed and incorporated, that money should be held for the company. Had the company not been formed it would have been a question whether the bank was not bound to return this money, without deduction, to the several persons who paid it in as intended subscribers to an abortive scheme. But no such question arose, for the scheme did not prove abortive; and, from the moment that the company was incorporated, the bank held that £655 for the company, just as if it had been paid in that day for the first time. There was very strong evidence that this was a conspiracy to defraud the public, *Wadge* and *Wall* being the prime conspirators, and the other six, *Hoare, Tully, McKenna, Murphy, Hughes,* and *McNally*, lending themselves with a guilty knowledge to aid that conspiracy. But there is no evidence, that we can see, that the managers of the bank had any knowledge that it was a conspiracy. Bankers do

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not in general open an account for persons unless they believe them to be creditable, and if through carelessness bankers do open an account for discreditable persons, those who have trusted them have a right to blame the bank, and it will suffer in its commercial reputation. But with deference to those of the Judges below who seem to have thought this important, we are quite unable to see how this affects the question as to how the money once paid in is to be drawn out.

Now, having stated this much, we proceed to call your Lordships' attention to the evidence that, in our opinion, shews that the three persons who signed these cheques as directors, viz., *Wadge, Hoare,* and *McNally,* were permitted by the company to take possession of the position of directors *de facto.* As the directors appoint the secretary, they, if installed in the office of directors, though irregularly, could appoint *Wall* to act as secretary. The office of the company was at 12, *Grafton Street.* It does not appear whether it ever was registered as such, probably it was not, but it is clear that it was so in fact. [His Lordship referred to the prospectus and to several parts of the evidence.] And it appears that every one of the seven persons who subscribed the memorandum and articles was perfectly aware that *Wadge, Hoare,* and *McNally* had possession of the company's office, were represented to be directors, and transacted whatever business there was to transact, consisting chiefly of obtaining subscriptions, allotting scrip, and making calls and receiving payment of some of those calls; that all these things were done appears both from the statement of the Lord Chief Justice of the Common Pleas, and from the documents put in at the trial. That they had possession of the books of the company (such as they were) is proved.

The articles of association, which every member of the company must be taken to know, provide, by Article 4, that "the directors may commence the business of the company as soon after the incorporation thereof as they, in their discretion, shall think fit," and by Articles 52 and 53, that "the number of directors shall not be less than three or more than five," and that "the first seven persons who sign these articles, or a majority of them, shall appoint the first directors."

The jury found that no four of these seven persons ever agreed

to the appointment of directors, or assented to *Wadge*, *Hoare*, or *McNally* acting as such. This, if understood to mean that no four ever met together and formally assented to their so acting, is probably quite correct; but it is impossible, in the face of the evidence, to understand the jury as finding that no four of them as individuals assented to their so acting.

It seems, therefore, to be a proper inference from these facts that there was an actual appointment of these three as directors, though a very informal one; and so literally came within Article 85.

But we think it quite enough, these men being thus permitted to be in actual possession of the directorship, to make their acts valid as regards third persons with persons who dealt *bonâ fide* with persons who may be termed *de facto* directors, and who might, as far as they could tell, have been directors *de jure*.

In *In re County Life Assurance Company* (1), that was held by Lord Justice *Giffard* in a case where there actually were *de jure* directors, who had objected to the *de facto* directors acting, that the acts of the usurpers were held binding, no steps having been taken to oust them. That is a far stronger case than this, for here the *de facto* directors were the only directors.

Objection was made to the form of the letter of the 21st of July which does not in distinct terms say that the resolution was passed by the directors, but documents on which men are to act in the course of business are not to be criticised too closely. No one could fail to understand the letter as meaning that there was such a resolution. It is found by the jury that there was no such resolution; but the bankers did not know that the statement was false, and, as is found by the jury, believed it was accurate; and, according to the decision in *Royal British Bank* v. *Turquand* (2), were not called upon to inquire whether it was true or false. They were told by the persons who alone acted as directors, and who alone had authority to pass any resolution, that it had been passed, and that they, the directors, were acting on the authority given to them by that resolution.

It is only farther necessary to notice the objection to the form of the cheques made at your Lordships' Bar. We do not think it

(1) Law Rep. 5 Ch. Ap. 293. (2) 6 El. & Bl. 327.

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necessary to inquire whether the bankers were bound to honour cheques so informally drawn. Probably they might have objected and required more formal vouchers. Neither do we inquire whether the cheques sufficiently on the face of them indicated that the company was the drawer, so as to enable a holder to sue them as drawers within the Law Merchant. Perhaps they did not. We think it enough to say that (assuming that those who signed had authority to draw for the company) the bankers have a sufficient voucher when they produce an order to pay the money, really signed by those persons, really acting under their authority, though, it may be, that that authority was exercised in an informal manner.

Upon these grounds, we are of opinion that the verdict should be entered for the Defendant (1).

1875
July 12.

THE LORD CHANCELLOR (Lord *Cairns*):—

My Lords, the *East Holyford Mining Company, Limited,* was incorporated on the 17th of July, 1866, its memorandum and articles of association being registered on that day. Some time before its incorporation a prospectus had been issued, giving the names of *Wadge*, *McNally*, *Hoare*, and *Lewis*, as directors, and of *Wall* as secretary, and stating that the offices were at 12, *Grafton Street, Dublin.* This prospectus could, of course, only be taken as representing that it was intended to appoint those persons as directors and secretary of the company when incorporated. The prospectus, however, represented that the mines which were intended to be worked were ready for the immediate commencement of operations, and solicited persons to become shareholders, with a deposit of £1 per share, the *National Bank, Dublin*, being described as the bank of the company.

The result of this prospectus, and of a similar prospectus subse-

(1) The following note was appended to the opinion of the Judges by Mr. Justice *Grove*:—

MR. JUSTICE GROVE:—

I assent to the question of their Lordships being answered in favour of the Defendant, but not without doubt, arising mainly from the fact that Mr. *Wall* was not duly appointed secretary, and that the bankers did not make any inquiry as to his being the secretary, as to his authority to act, or as to the truth of his representations.

quently issued, was that considerable sums, amounting to nearly £4000, were paid into the *National Bank*, partly before, and partly after the 17th of July. These sums were placed to the credit of "the *East Holyford Mining Company, Limited*," and it is for the recovery of these sums that the action out of which this appeal arises was brought by the liquidator of that company. The bankers admit the receipt of the moneys, but claim to discharge themselves by shewing payment of nearly the whole, in answer to cheques drawn, as they say, on behalf of the company. The question is whether these cheques were drawn in such a way, and under such circumstances, as to have made it proper for the bankers to treat and act upon them as the cheques of the company.

The articles of association of the company provided—[His Lordship read such of them as are material in this case; see *ante*, pp. 872–3.]

My Lords, these appear to me to be all the clauses of the articles to which it is necessary to refer, and I have only to add that the first seven persons who signed them were *Hoare, Wall, Tully, McKenna, Murphy, Hughes,* and *McNally.*

These articles are the expression of the power delegated by the company to those who were to represent it as the executive. They contemplated, as your Lordships will observe, that an executive was forthwith to be formed; that it was to commence, or might commence business, that payments would require from time to time to be made by the bankers, and the articles indicate, on the one hand, to the bankers the quarter to which they were to look for their authority, and on the other hand to the shareholders, the fact that there was to be an immediate executive of the company, managing its affairs, and commanding its money, to be constituted and put in motion by a majority of the seven persons whose names I have mentioned.

On the 21st of July, 1866, the manager of the bank received the following letter, dated from 12, *Grafton Street, Dublin,* the office of the company, and signed by *Wall* as secretary:—[His Lordship read the letter and the resolution; see *ante*, pp. 871–2.]

Three of the persons named in this letter, *Hoare, McNally,* and *Wall,* were three of the seven persons who, as I have already said, had signed the memorandum and articles of association.

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The bank acted on the faith of this letter, and paid away from time to time, upon cheques signed in the manner mentioned in the letter, moneys to an amount nearly approaching the whole balance of the company: and it is not disputed that if these payments were properly made on account of the company, they, together with certain commissions, and a small sum paid to the official liquidator, discharge the bank from the whole of the deposits placed to the account of the company.

There is now no doubt that this company was what is called a "bubble" company; that none of the persons signing the memorandum and articles of association had any real interest in the company; that no regular meetings of shareholders or directors were ever held; and that the company was probably got up for the purpose of taking over some land, said to contain mines, belonging to *Wadge* himself, who was the projector of the company. It appears by the report of the Chief Justice of the Court of Common Pleas in *Ireland*, which report is taken to be the special case, that *McKenna*, *Murphy*, *Hughes*, and *Tully*, were in constant attendance at the office of the company in *Grafton Street*, as were also *Hoare*, *Wadge*, and *Wall;* and that all the business of the company was transacted at those offices. With regard to *McNally*, who does not appear to have attended at the office, although he states that he was not aware he was ever appointed, or in fact was, a director of the company, and never, as he says, knowingly acted as such, he appears to have signed, as director, the cheques drawn upon the bank, and cannot therefore, as I think, be allowed to say that he did not act as a director of the company. It is not pretended that any person other than *Wadge*, *McNally*, and *Hoare*, acted as the directors or executive of the company.

Under these circumstances it becomes necessary to consider how far the bankers were justified in paying the cheques. They were informed by *Wall*, who was attending at the only office of the company as its secretary, and was acting as such, that a resolution of the board had been passed authorizing cheques to be signed by two of the three directors, *McNally*, *Wadge*, and *Hoare*, and countersigned by the secretary. Undoubtedly *McNally*, *Wadge*, and *Hoare*, were acting as directors of the company; undoubtedly no person else was professing or claiming to act as directors; and

undoubtedly it was necessary that some persons should act as directors of the company, or the business of the company could not be carried on. Undoubtedly *McKenna*, *Murphy*, *Hughes*, and *Tully*, were aware that *Wadge*, *Hoare*, and *McNally* were acting as directors, for they were acting as clerks under them, and they made no opposition to *McNally*, *Wadge*, and *Hoare* so acting. It appears to me that under these circumstances the bankers were justified in accepting the statement of *Wall*, who, as acting secretary of the company, was clearly the proper person to make the communication that *McNally*, *Wadge*, and *Hoare*, were the directors, and would sign the cheques. It is suggested that they might have inquired into the accuracy of *Wall's* statements. But suppose they had inquired, and that *Wall* had shewn them a resolution appointing these persons as directors, the document so shewn might have been false or spurious, just as *Wall's* letter is said to have been false, and the bankers could have no certainty of the truth of what was stated to them unless they had themselves attended the meetings of the directors, and heard what was done there—a course which I need hardly say it would be impossible for men of business to take. It appears to me that this is exactly such a case as the 85th section of the articles of association is meant to meet. There is no regular appointment of directors, and the persons so acting may perhaps have been disqualified; but the acts done by them are to be taken as being as valid as if they had been duly appointed and qualified.

I should have had no doubt whatever that this was the true view of the case had it not been somewhat embarrassed by the findings of the jury in *Ireland*. The jurors found that the bankers altogether acted on the faith of *Wall's* letter; believing it to be accurate, and so far their finding is, I think, satisfactory and clear. They have also found that no four of the seven persons who had signed the articles of association ever agreed to the appointment of directors, or assented to *Wadge*, *Hoare*, or *McNally* acting as such; and that no resolution was passed as stated by *Wall* in his letter to the public officer of the bank. The jurors probably meant in these findings to state that there had been no joint agreement, or assent, in any four of the seven persons to the appointment of directors, and in this they probably were justified

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by the evidence. But it is also plain from the evidence, and, as I think, consistent with the finding of the jury, that six of the persons who signed the memorandum knew that two of their number and *Wadge* were acting as directors, and were the only acting directors of the company, and that the business of the company was conducted and managed by them, and that they never in any way repudiated their acts or dissented from their occupying the position which they had assumed.

I agree with the learned Judges who have advised your Lordships that the learned Judge at the trial ought to have called the attention of the jury to this view of the case, as Mr. *Butt* on behalf of the bank appears to have requested him to do; and inasmuch as your Lordships are free to consider, under the reservation of the Judge, what questions ought to have been submitted to the jury, and to draw such inferences of fact, as, in your opinion, the jury ought to have drawn, I have no hesitation in advising your Lordships, in accordance with the opinion of the learned Judges who have attended the hearing of this case and have advised your Lordships, that you should now hold that there having been *de facto* directors of the company, who were suffered and permitted by the majority of those who signed the articles of association to occupy the position of and act as directors, and the bankers having, in the full belief that these persons were directors, as they were represented to be, honoured the cheques drawn by them, the payment of these cheques is an answer to the action of the liquidator of the company, and that the judgment in the action ought to be entered for the Defendant, the public officer of the bank, and the present appeal allowed.

My Lords, I have not thought it necessary to refer to a distinction taken founded upon the particular form of certain cheques. Some of the cheques were drawn without a mention, on the face of them, of the *Holyford Mining Company*, but they profess to be signed by *McNally* and *Wadge* as directors, and *Wall* as secretary. They were intended by those who drew them to operate on the funds of the company; they were accepted by the bankers as so intended. The question being merely as to the authority given to the bankers to make the payment, it appears to me that when those who drew and those who honoured the cheque knew the

account on which it was intended to operate, the result was the same as if the account had been mentioned on the face of the cheque, and that no distinction is to be made as to the money paid upon these cheques.

LORD CHELMSFORD :—

My Lords, the only question to be determined upon this appeal is whether, upon the finding of the jury, the verdict ought to be entered for the Plaintiff or for the Defendants.

The *Holyford Mining Company* may not improperly be described as a bubble company, but it was brought out in the usual mode by which joint stock companies are formed. A memorandum of association, stating the object for which the company was established, was signed by seven persons, and was duly registered on the 17th of July, 1866, upon which the company became incorporated. Articles of association were agreed upon and were signed by the same seven persons who signed the memorandum of association. And prospectuses were issued of the usual character describing the advantages likely to be derived by persons joining the undertaking. These prospectuses contained the names of the directors and secretary of the proposed company, and of the "*National Bank, Dublin,*" as the bankers.

There is no evidence of the particular mode in which the account was opened between the bank and the company, but it may fairly be assumed that the prospectuses at least, if not the other documents connected with the formation of the company, were communicated to the bank before the opening of the account. Money was paid in to the bankers, before the registration of the memorandum of association, by intended shareholders, to the account of the *East Holyford Mining Company.* If the company had not been formed, these sums must have been returned to the persons who paid them in, but, on the formation of the company, the account could only be operated upon by the persons authorized by the articles of association.

We have a right to assume that the bankers, acting with proper caution, before they commenced transactions with the company, referred, as they were bound to do, to the articles of association, to ascertain in what manner the account which had been opened was

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to be drawn upon. Beyond the particulars of the objects of the company, and information as to the mode in which the account was to be dealt with, which alone the bank was concerned to know, I do not consider that any more preliminary inquiries were necessary. Upon referring to the articles of association they would have found, by the 58th clause, that every sum paid on behalf of the company amounting to £10 or upwards, was to be paid by cheques to be signed and countersigned as might from time to time be directed by the board.

With this information the bankers must have been prepared to receive a communication on behalf of the company as to the persons who were to sign and countersign the cheques. And on the 26th of July they received the expected letter from *Wall*, the person already introduced to them through the prospectus as the secretary of the company:—[His Lordship read it; see *ante*, p. 871.]

There can, now, be no doubt that at this time there had been no such resolution, and attention was called in argument to the terms of the letter, which does not state that the resolution had been passed by the directors. I do not think that the bankers receiving this letter were bound to go inside the offices of the company, to satisfy themselves that it had been so passed. And although upon a close and critical examination of the letter, with eyes of suspicion, it may be discovered that all mention of directors in connection with the resolution had been, perhaps intentionally, avoided, yet it is not at all likely, where no concealment was suspected, that the letter would be so nicely scanned by the bankers, and it might honestly be received (as I have no doubt it was) as a communication in regular course, from the secretary, of a resolution passed by persons duly authorized in pursuance of the 58th clause of the articles of association.

More than one of the learned Judges in the Exchequer Chamber in *Ireland* attributed negligence (if not something worse) to the bankers in becoming the bankers of the company. In particular, Mr. Justice *Fitzgerald* says: "It is not stated how or by what means they became the bankers of this company, and we may conclude it was for the purpose of making interest on the money that the *National Bank* became the bankers to this scheme. I pause here for a moment to look at the responsibility of any one

of these institutions accepting the position of bankers to such companies. The public trust that the bank shall not become parties to or lend themselves to any fraudulent scheme of directors. People pay in their money on the understanding that the bank will not pay away any of that money on fraudulent representations, and that it will not be improperly parted with. We ought to regard with jealousy the conduct of our banks, that they should be careful not to become parties to a fraud by lending it the influence of their names, and there ought to have been some evidence given on the part of the *National Bank* to clear away this portion of the case, to relieve themselves from the apparent imputation of great want of caution in these transactions."

With great respect I cannot think that the bank in its transactions with the company has deserved this severe censure. And as far as I can discover, the idea of any impropriety on the part of the bankers, in opening the account with the company, never occurred to any one till the case was in the Exchequer Chamber, and some of the learned Judges availed themselves to so large an extent of the liberty of drawing inferences. But it having been more than insinuated that the bankers, for their own interest, had lent themselves to the fraudulent scheme of the directors, every transaction with the funds in their hands is regarded with an eye of suspicion. And it having been assumed, without evidence, that *Wadge* had fraudulently appropriated the money paid into the account by means of cheques drawn in his own favour, it is suggested by some of the learned Judges with respect to a cheque of £1000, that the bank had participated in the fraud in order that the amount might be paid by transferring it to *Wadge's* private account. I feel bound to say that I find nothing throughout the evidence to justify any suspicion of the integrity of the bankers in their transactions with the company. They appear to be of an ordinary banking description. Nothing in the facts proved was calculated to awaken suspicion that the scheme was a fraudulent one. Nor in my opinion was it any part of the duty of the bankers to inquire into the solvency of the promoters of the company.

The Lord Chief Justice, in his judgment in the Exchequer Chamber, expressed his opinion that the finding of the jury that

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the bankers altogether acted on the faith of Mr. *Wall's* letter, believing it to be accurate, could not be maintained, and that the first and second findings were all that remained in the case. The first finding of the jury is that no four of the seven persons who signed the articles of association ever agreed to the appointment of directors, or assented to *Wadge*, *Hoare*, or *McNally* acting as such. If it is now open to the bankers to question this finding, it may be said, that although there was no evidence of four of the persons who signed the articles of association formally meeting and agreeing together to such appointment, yet there was ample proof that not four of the seven merely, but all the seven, had assented to the three persons named acting as directors. The three named persons attended the offices of the company as directors, and the other four who signed the memorandum of association were in attendance in the offices as clerks. If the question had been put to the jury, as I think it ought, whether in these circumstances the shareholders of the company had assented to the acting of the directors, the answer must have been in the affirmative.

But, even allowing the first and second findings of the jury to stand, I think that the third finding is sufficient to entitle the bankers to a verdict. Mr. Justice *Fitzgerald*, indeed, says: "I cannot find in the whole of the case one particle of evidence that the bank acted on the faith of Mr. *Wall's* letter, nor one particle of evidence affirmatively applied to it." But with great submission, the cheques themselves paid by the bank furnish the clearest evidence that the bankers did act on the faith of this letter. For they are all drawn in the form mentioned in the letter, signed by two of those whose names were sent to the bank as the persons who would sign cheques, and they are countersigned by *Wall* as the secretary.

The bankers, therefore, having acted *bonâ fide*, and dealing with persons acting as directors, without any reason to believe they were unauthorized so to act, and this being found by the jury, they are, in my opinion, entitled to judgment, notwithstanding the two other findings, as to the non-appointment and absence of assent to the appointment of directors, and to there being no such resolution by the directors as that mentioned in *Wall's* letter.

With respect to the objection that the name of the company is not on eight of the cheques paid by the bank, and therefore by the *Companies Act*, 1862, they are invalid, and the official liquidator is entitled, at all events, to the amount of these cheques, the short answer is, that although the bankers might perhaps have required that these cheques should be made formally correct before they were paid; yet having paid them upon the demand of the only persons whom they knew as representing the company in the operations upon the account, there is not the slightest pretence for insisting upon the liability of the bank to repay the amount of these cheques on the ground of an unauthorized payment of them.

I think the judgment ought to be entered for the Defendant.

LORD HATHERLEY:—

My Lords, it appears to me also that the judgment in this case should be entered for the Defendant.

It is a point of very great importance that those who are concerned in joint stock companies and those who deal with them should be aware of what is essential to the due performance of their duties, both as customers or dealers with the company, and as persons forming the company, and dealing with the outside world respectively. On the one hand, it is settled by a series of decisions, of which *Ernest* v. *Nicholls* (1) is one and *Royal British Bank* v. *Turquand* (2) a later one, that those who deal with joint stock companies are bound to take notice of that which I may call the external position of the company. Every joint stock company has its memorandum and articles of association; every joint stock company, or nearly every one, I imagine (unless it adopts the form provided by the statute, and that comes to the same thing) has its partnership deed under which it acts. Those articles of association and that partnership deed are open to all who are minded to have any dealings whatsoever with the company, and those who so deal with them must be affected with notice of all that is contained in those two documents.

After that, the company entering upon its business and dealing

(1) 6 H. L. Cas. 401. (2) 6 El. & Bl. 327.

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with persons external to it, is supposed on its part to have all those powers and authorities which, by its articles of association and by its deed, it appears to possess; and all that the directors do with reference to what I may call the indoor management of their own concern, is a thing known to them and known to them only; subject to this observation, that no person dealing with them has a right to suppose that anything has been or can be done that is not permitted by the articles of association or by the deed. For instance, a person dealing with such a company as this, a mining company, could not attempt to set up any right upon a policy of insurance as having been granted to him by the directors of the company, or to found a claim upon any other matter which is not a matter contained in their articles of association. He must be taken to have perfect knowledge that they had no power to do anything of that kind, and therefore nothing can be of any avail to him that is contrary to the articles of association, with which he must be taken to be acquainted.

This being the case, a banker dealing with a company must be taken to be acquainted with the manner in which, under the articles of association, the moneys of the company may be drawn out of his bank for the purposes of the company. My noble and learned friend on the woolsack has read those articles by which, in this case, the bankers were informed that cheques might be drawn upon the bank by three directors of the company. And the bankers must also be taken to have had knowledge, from the articles, of the duties of the directors, and the mode in which the directors were to be appointed. But, after that, when there are persons conducting the affairs of the company in a manner which appears to be perfectly consonant with the articles of association, then those so dealing with them, externally, are not to be affected by any irregularities which may take place in the internal management of the company. They are entitled to presume that that of which only they can have knowledge, namely, the external acts, are rightly done, when those external acts purport to be performed in the mode in which they ought to be performed. For instance, when a cheque is signed by three directors, they are entitled to assume that those directors are persons properly appointed for the purpose of performing that function, and have properly performed the

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function for which they have been appointed. Of course, the case is open to any observation arising from gross negligence or fraud. I pass that by as not entering into the consideration of the question at the present time. Outside persons when they find that there is an act done by a company, will, of course, be bound in the exercise of ordinary care and precaution to know whether or not that company is actually carrying on and transacting business, or whether it is a company which has been stopped and wound up, and which has parted with its assets, and the like. All those ordinary inquiries which mercantile men would, in the course of their business make, I apprehend, would have to be made on the part of the persons dealing with the company.

But what do the bankers find in the case now before us? They find on the face of the deed how the directors are to be appointed; they find that the first directors are to be appointed by the majority of the first seven persons (that is to say, by four of them) who signed the articles of association, they find, both by the articles of association and by the second prospectus which was issued (the prospectus which was issued before the articles were signed could, of course, have no effect upon the company, which was not then formed, but a second one was issued very shortly afterwards in July, after the incorporation of the company and the registration of the articles of association), that the place of business was fixed at 12, *Grafton Street*. That was an external fact with which they might well acquaint themselves. They might well have been justified in entertaining doubts as to whether they should transact business with the company if they had found it carrying on business in any other place, supposing they had not been made acquainted with any change of abode. But they go to No. 12, *Grafton Street*, and they find there an office, and they find there a person acting as secretary, who is the same person as the person described as the secretary in the second prospectus, issued after the company was formed. They find there certain persons in constant attendance, namely, six out of the seven persons who signed the articles of association. I believe all the seven were at one time or another in attendance, but six were there constantly. And one of the witnesses says (I need not turn to his evidence for this purpose), that Mr. *Hoare* and another person, as to whom they were informed that they

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were the directors, were there acting as directors. Finding then a certain number of persons acting as directors, who had been represented to them to be directors, and finding four other persons who might well have elected them to be directors (having the authority and the power to do so), on the spot daily, sitting by and seeing them performing those directorial functions, what conclusion could they come to but that those directors had been duly appointed? And, my Lords, I apprehend we are quite justified in holding that the 85th clause of the articles of association covers any defect there might have been in that appointment.

Then the bankers get a notice from a person who calls himself the secretary, and who says he gives them a Resolution under the authority of which, and according to the form there stated, the cheques are to be drawn. I pass by altogether, as really immaterial in the inquiry, the circumstance that a fraud may have been intended on the part of the company in the way in which the letter was expressed. That could have no effect upon the bankers; the jury found by the verdict that the bankers acted entirely in good faith upon the representations contained in that letter. It has been noticed that that letter does not mention, in words, that the resolution was passed by a vote of the board of directors. But the subject matter of it was the drawing of cheques; the mode of providing for the drawing of cheques is treated of in the articles, and it is there laid down that that duty is to be performed by the directors. The bankers were furnished with the names of three so called "directors," who sent their signatures in order that the bankers might have an opportunity of verifying the signatures upon any cheques that might be drawn. If the bankers went there and found the secretary sitting there, as the evidence tells us he did all day long from ten till six, and performing the duties of a secretary, and if they found some of these other gentlemen sitting there appearing to be performing the duties of directors, and if they saw those four other gentlemen who might have appointed them as directors sitting there also, witnessing them performing the duties of directors, I must ask what more could be required on the part of those who were dealing with the company, and who had obtained all the external information they could upon the subject. If we are not now to hold that the bankers are to be

protected in honouring the drafts of these three persons, who, they were informed, were authorized to draw cheques, I do not know how any person, dealing with a company, can be safe against being bound to inquire into all the minute transactions which may have taken place indoors. Any defect in the appointment of directors, it appears to me the 85th clause of the articles in this case, independently of any general law upon the subject, was intended to cover.

My Lords, that being so, there was another matter which might possibly have attracted the attention of the bankers and given them the more confidence in what took place at 12 *Grafton Street* visibly and openly, and in the constant view of all those who were directly interested in the company. The 34th clause of the articles says that "the directors may whenever they think fit, and they shall upon a requisition made in writing by any number of members not less than five, holding in the aggregate not less than 500 shares in the company, convene an extraordinary general meeting." Now, it appears to me that looking at the payments which had been made in to the bank, the bank might have had every reason to suppose that there were at least five members holding 500 shares in the company who might have been gathered together. But, if not, they still would have their original knowledge, as communicated to them by the secretary, of the directors being appointed; they would have their original knowledge of who those directors were, and of what their signatures were.

Now, if the question came to be which of two innocent parties (as it is said) was to suffer loss, I apprehend, my Lords, that in point of law what must be considered in cases of that kind is this: which of the two parties was bound to do, or to avoid, any act by which the loss has been sustained. I think there can be no doubt that in this case the shareholders of the company were the persons who were bound to see that nobody usurped or assumed the office of director unduly; that is to say, without that office having been properly conferred upon him. The shareholders of the company were persons some of whom had, though others perhaps had not, received the prospectus originally, when they did receive it they must have seen those persons named in the first or in the second prospectus issued after the incorporation had taken place. At all

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events the shareholders knew that if the company was to be carried on at all there must be some acting body, and as the subject matter of the prospectus to which they were invited to contribute was a mine, which was to be set at work immediately, they must have known that if it was to be immediately set at work, there must be expenditure, and they must have known that expenditure would necessarily go on from time to time upon the ordinary business of the company, independently of that special work which they were undertaking amongst themselves to execute. Now whose business was it to see that that was all properly done? It was the business of the shareholders to see that it was done, and properly done, and if they allowed this duty to be assumed by persons who had no title to it, in their office at 12 *Grafton Street*, the place where the office of the company was described in the prospectus as being—if they allowed persons who were not entitled to do it to carry on all the business of the company there—to act as directors and as secretary there; especially if they allowed them to perform the most important business of drawing cheques (for they must have known their own deed, which says that that can only be done by a draft of three directors, and they must have known that money must be had for the purposes of the company), if there is a fault on the one side or the other, it is on the side of those who allowed all these transactions to take place, when they were not conducted by persons legitimately appointed on the part of the company.

On the other hand, on the part of the bankers, I see no possible mode by which they might have pursued their inquiries in the manner contended for at the Bar without requiring all the minute-books of the company to be produced to them, and without conducting a detailed investigation into all the transactions of the company as to the appointment of directors and the like—a duty they were not called upon to perform, and a duty which, if it was objected to, they could not have insisted upon performing. I apprehend, my Lords, that the bankers having done all that was strictly their duty to do—having made themselves acquainted with the articles of the company, and having seen the offices of the company, with persons there affecting to perform all the duties of directors according to those articles, and having seen those who

had the power of appointing them continually present there, witnessing their performance—there can be no doubt that in this state of circumstances the bankers are not in any default whatsoever, and that the cheques must be taken, as between them and the company, to have been properly drawn, and the shareholders must be held liable to the loss.

My Lords, two cases (1) were cited in the argument in which a fraudulent use was made of the seal of a company by the secretary of the company who had been entrusted with that seal. Those cases, however, can have no bearing upon the present case, for they are simply like cases of forgery. It was just as if signatures, not a seal, had been required and the secretary had forged the names of the directors. A secretary having no authority to do so, affixed the seal of the company, and the instrument to which that seal was affixed was as void as if the question had been one of handwriting and a signature had been forged. I do not think any other authority has been cited for the purpose of shewing that the bankers in this case ought to be held responsible for matters which were not in any way under their control, and which they were not bound to inquire into.

LORD PENZANCE:—

My Lords, the circumstances of this case, and the law as applicable to those circumstances, have been so very fully dealt with and handled by your Lordships who have preceded me, that I shall feel it necessary to occupy your Lordships' attention but a very short time. I may say at the outset that I do not differ in the slightest degree from any of the principles that I have heard enunciated, or from the application which has been made of those principles to the circumstances of this case. Neither do I in any degree differ from the conclusion at which the learned Judges have arrived. But I wish to place my opinion in this case upon a single ground, which I think is one worthy of being maturely considered and adopted on account of its general bearing upon the dealings of public companies.

I allude, my Lords, to the ground that is taken in the cases

(1) *Bank of Ireland* v. *Evans' Charity*, 5 H. L. Cas. 389; *D'Arcy* v. *Tamar, &c., Railway Company*, Law Rep. 2 Ex. 158.

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which have been cited in argument in this case, especially the ground taken in *The Royal British Bank* v. *Turquand* (1). I find, in the opinions of the learned Judges in the Court of Exchequer Chamber in *Ireland*, a quotation from the judgment in that case (2). That quotation is in these words: Chief Justice *Jervis*, in giving judgment in the Court of Exchequer Chamber in that case, said: "We may now take for granted that the dealings with these companies are not like dealings with other partnerships, and that the parties dealing with them are bound to read the statute and the deed of settlement." In that particular case the company was so constituted that the statute and the deed of settlement were enough. In this case there are the articles of association, which would fall, no doubt, within the same category; they "are bound to read the statute and the deed of settlement; but they are not bound to do more, and the party here, on reading the deed of settlement, would find not a prohibition from borrowing, but a permission to do so on certain conditions." The question in that case being, whether those who had affected to borrow had borrowed in accordance with the proper resolution which ought to have been made under the deed of settlement, the learned Judge says that the parties would not find any prohibition in the deed of settlement "from borrowing, but a permission to do so on certain conditions. Finding that the authority might be made complete by a resolution, he would have a right to infer the fact of a resolution authorizing that which, on the face of the document, appeared to be legitimately done."

My Lords, I conceive that that is a very important principle, and I have not heard anything said in the course of the argument in the present case which should induce your Lordships to depart from it. I now propose to apply that principle to the present case.

In the present case, from the time when the *East Holyford Mining Company* came into existence, that is after the registration of the memorandum and articles of association, three persons usurped the position of directors (I say "usurped," because they do not seem to have been regularly appointed) and another person usurped the office of secretary. This they did in the face of the

(1) 6 El. & Bl. 327. 2 Jur. N.S. 663. (2) 6 El. & Bl. at page 332.

subscribers to and shareholders in the company, as well as of persons dealing with the company; and both before the company was legally formed, and after it was formed, they publicly advertised themselves in the prospectus as directors and secretary respectively. They occupied the offices designated in the prospectus, and they opened an account with the bank therein named. During the six months following they assumed, to the exclusion of all others, the executive functions of the company; no subscribers, nor shareholders, nor strangers dealt with any one else, and no one questioned their authority. Therefore, during the whole of the time that this company was acting as a company, these individuals were ostensibly directors and secretary respectively, and they were the *de facto* directors and secretary. That that is the result of the evidence I am justified in saying from a reference to the summing-up of the evidence, which is called a special case in the papers before us, made by the learned Chief Justice who tried the cause. He says that the cheques were "countersigned by the said *Charles H. Wall*, who described himself and appears to have acted as secretary." He goes on to say, afterwards, that it was proved by certain witnesses, "that Mr. *Hoare*, Mr. *Wadge*, and Mr. *Wall* were in constant attendance at the office and received persons calling on the business of the company, and that no meeting, either of shareholders or directors, was ever held or convened—everything that was done having been done by Mr. *Wadge*, Mr. *Hoare*, and Mr. *Wall*."

It seems to me, therefore, my Lords, that we have here the case of three individuals being *de facto* directors, and one being *de facto* secretary. That is the state of things with which we have to deal, and in that state of things the *de facto* secretary writes a letter to the bankers with reference to the mode of drawing cheques, which, according to the articles of association, might be drawn by any number of directors, according to the regulations to be made by the directors under a proper resolution. In this letter he states that a resolution had been come to, and that certain directors were to be appointed to draw the cheques, and he sends the signatures of those directors for the guidance of the bank in recognising the cheques that were to be honoured. Thereupon the cheques are drawn and the money is paid out by the bank upon them. There-

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fore we have this simple state of things, a *de facto* acting secretary of a company forwarding to the bank which has the account of the company, the names of directors who are said according to a resolution to be the persons authorized to draw out the money; and from that moment we have everything regularly done in accordance with that letter.

My Lords, I think it is a question of very great importance in reference to all companies, whether the bankers were or were not justified in stopping at that point and acting upon that authority. The suggestion of the Respondent here is that the bank was bound to inquire, not whether this was the acting secretary, but whether he was the legally constituted secretary. In order to do that the bankers would have to inquire in the first place whether the directors had appointed him, because, under the articles of association, which they were bound to know, they would see that the directors were to appoint the secretary. Then the bank would have farther to inquire whether the directors themselves were properly appointed. Under the articles of association the first directors were to be nominated by the first seven signitaries of those articles. The bankers would therefore have to inquire into everything that had been done from the commencement of the company. And although this was a bubble company, the same thing would have had to be done as if this company had been a perfectly solvent one.

My Lords, the question is a very broad one whether a bank under such circumstances, having a written authority of a *de facto* secretary, is bound, before it acts upon that authority, to ascertain whether he is the properly constituted secretary of the company or not, and not only that, but whether any resolution, of which he forwards a copy, was properly passed by the directors. Now, my Lords, the case of *Royal British Bank* v. *Turquand* (1) distinctly lays down the proposition that the bank is not bound to make any such inquiry, but that it is justified in acting upon a letter such as that to which reference has been made, provided that the transaction which appears upon that letter is one which might legally have taken place, and been legally consummated under the articles of association. Upon this simple ground, my Lords,

(1) 6 El. & Bl. 327. 2 Jur 45. 663

it seems to me that your Lordships would be perfectly justified in directing the judgment in this case to be entered for the Defendant.

I will only advert to one point more. I have not heard any argument addressed to this House which has satisfied me that the 85th clause of the articles of association was not sufficient to cover the defect of appointment of these directors. The words of that clause are extremely large; the substance of it is that, if the directors act, and third persons deal with those directors, the acts of the directors shall be valid, although they have not been properly appointed. In this case, no doubt, they were not properly appointed; they appear to have had either the formal, or the informal, assent of three out of the four persons who would have constituted the majority necessary to make a proper appointment; but, nevertheless, although not properly appointed, they would seem to have their acts validated under the 85th clause.

With regard to the cheques which do not bear the name of the company, I can only say, as has been said by my noble and learned friend on the woolsack, that those cheques appear to me, looking at the way in which they were drawn, and understood by those who drew them, and by those who paid them, to stand in no different category from the rest of the cheques in this case.

Judgment of the Court of Exchequer Chamber in Ireland reversed, and judgment ordered to be entered for the Defendant in the action.

Lords' Journals, 12th July, 1875.

Solicitors for the Appellant: *W. Tatham & Son.*
Solicitors for the Respondent: *Bell, Brodrick, & Gray.*

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ACCOMMODATION.] At some of the stations of a railway a colliery owner had been allowed to leave his coals on the ground adjoining the lines:—*Held*, that this might have been made the subject of an agreement for payment for any advantage thus obtained by him, but did not come within the description of a "service" contained in an exception in the Railway Act, by which a special payment was to be demanded for a special "service." LANCASHIRE AND YORKSHIRE RAILWAY COMPANY *v.* GIDLOW - - - - 517

ACCOUNT: *See* ELECTION; EXECUTORS; PARTNERSHIP; RESIDUARY LEGATEE.

"ADEQUATE AND SUFFICIENT LOAD": *See* COLLIERY OWNER.

AGREEMENT: *See* RAILWAY.

By an agreement entered into between the directors of two railway companies, the *N. W. Co.* was to have running powers over the *L. Co.'s* lines subject to the *L. Co.'s* bye-laws; was to be at liberty to have its own staff at the *L. Co.'s* stations, and be allowed a reasonable sum for cartage, clerkage, &c.; the *L. Co.* was to be at liberty to call on the *N. W. Co.* to carry passengers and goods for the *L. Co.* upon the *L. Co.'s* local lines, and both sets of directors bound themselves to send by each other's lines all traffic not otherwise consigned. A chief consideration for this agreement was an advance of money by the *N. W.* directors to the *L. Co.'s* directors; but no mention of this consideration was made in the agreement. Nor, though there were in the agreement provisions for referring to arbitration any differences that might arise as to the agreement, was there any mention of any time for which it was to endure, or how it might be terminated:—*Held*, that all the provisions of the agreement shewed that it was a permanent and not a terminable agreement; and that, consequently, a notice to terminate it at the end of six months from a given time was invalid.—*Per* Lord *Selborne*: An agreement *de futuro*, extending over a tract of time which, on the face of the instrument, is indefinite and unlimited, throws upon a person alleging it not to be perpetual, the burden of proving that allegation. LLANELLY RAILWAY AND DOCK COMPANY *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY - - - - - 550

APPOINTMENT, DEED OF: *See* NEXT OF KIN.

ARBITRATION: *See* INTEREST; RAILWAY. 6.

ARTICLES OF ASSOCIATION: *See* COMPANIES ACT.

ASSUMPSIT: *See* MONEY HAD AND RECEIVED.

ATTAINDER.] An attainder was pronounced, in 1538-9, against *Margaret P.* and against her son *Henry P.* He was beheaded in that year. She was for a time spared. She united in her own person three baronies, described as having been created by writs of summons and sittings—*Montacute* (1299), *Monthermer* (1309), and *Montacute* (second of that name, 1357). By the ordinary course of descent *Henry P.* would have succeeded to these baronies had he survived his mother. He had himself sat in Parliament under the title of *Henry P.*, Lord *Montague*, and was so described in the Inquisition taken after his execution in 1539. The attainder against his mother was, by *Henry* VIII., put in force in 1541, when she was beheaded. In 1553 an Act of Parliament was passed (1 Mary, sess. 2, c. 1), intituled, "An Act for the Restitution in Blood of the Heirs of *Henry Pole*, late Lord *Mountague*." The Act, a private Act, was in a form of a petition to the Queen from the two ladies *Katherine* and *Winifred*, the only children of *Henry P.* It recited his attainder, and prayed that they and their heirs might be restored and enabled *onely* in blood as daughters and heirs of *Henry*, &c., and enabled to demand, ask, have, hold, and enjoy all such honours, castles, manors, lordships, &c., and all other manner of hereditaments, &c. which at any time shall come, remain, descend, or revert from any lineal or collateral ancestor of "your said subjects," &c., "other than such castles, manors, lordships, &c., which were of the said *Henry P.* in possession, reversion, remainder, or otherwise," at the day of his attainder. *Margaret P.* was not mentioned in the Act:—*Held*, that this Act had no effect on the attainder of *Margaret*, which still remained in full force. It only entitled the two ladies and their heirs to claim inheritances which they might derive from persons as against whose succession the attainder of *Henry Pole* himself would have been an obstacle. There was, therefore, no succession to the first three peerages, which must be traced through *Margaret*:—*Held*, also, that it was, at least, highly probable that the barony of *Montague*, by which title *Henry P.* had sat in Parliament, was (with a mere change of the

ATTAINDER—*continued.*

spelling of the name) one of those held by his mother, and for which he had received a writ of summons in her lifetime; and that the Act 1 Mary, which was not a reversal of his attainder, but only an Act for the restitution in blood of his heirs, had no effect on the barony in respect of which he had sat in Parliament. The Montacute and Monthermer Peerages - - 305

BANKERS: *See* Directors.

1. Where bankers have demanded and received unissued preference shares of a railway company as "collateral security" for advances they have made on the company's cheques, and have been registered on the registry of the company as the holders of such shares, a Court of Equity will examine into the circumstances of the transaction, and can direct the proper steps to be taken to cancel such registration. Beattie *v.* Lord Ebury [102

2. —— *McH.*, brought to *O. & G.* (a discount company), certain bills, which bore on them the acceptances of the *F. Co.* *McH.* was in fact the agent of the *A. & G. W. Co.* (an American company), and he and this American company had obtained the acceptances for their own accommodation, and on payment of a commission in respect of such acceptances. The bills were not paid, but renewed. *McH.* gave the *O. & G. Co.* his own guarantie and that of the American company that these bills should be paid at maturity. These renewed bills were not paid. The *O. & G. Co.* gave, on the 6th of April, 1866, notice of dishonour to all the parties whose names were on the bills. On the 9th of April the solicitor of the *F. Co.* gave full information to the *O. & G. Co.* that *McH.* was the real principal on the bills, which had been accepted by the *F. Co.* merely for his accommodation. The manager of the *O. & G. Co.* said they should see *McH.* in the afternoon. *McH.* afterwards gave, as collateral security to the *O. & G. Co.*, bills to a much larger amount, drawn on and accepted by another person, and the *O. & G. Co.* entered into an arrangement with *McH.* not to sue the *F. Co.* if these bills should be paid. Nothing farther was done in the matter for some months. These last bills were not paid, and the *O. & G. Co.* afterwards brought an action against the *F. Co.* to recover the amount of the bills originally accepted by the *F. Co.* The *F. Co.* filed a bill to restrain the action:—*Held*, that under all the circumstances the action must be restrained, for that the *O. & G. Co.*, with a knowledge of the real character of the *F. Co.*'s acceptances, had given time to *McH.*, who was the real principal on the bills, and had so discharged the *F. Co.*—Merely giving of additional security, by a principal, will not discharge a surety, but if the giving of such security is really a consideration for giving time to the principal, it will do so.—*Semble*, that to reserve a creditor's right against a surety there must be a distinct expression of intention to reserve it. Overend, Gurney, & Co. (Limited) *v.* The Oriental Financial Corporation (Limited) - 348

3. —— Bankers who have funds of a company (formed under the *Companies Act*, 1862) in

BANKERS—*continued.*

their hands may, (acting *bonâ fide*,) lawfully honour the cheques of the directors of the company, signed according to a form previously sent in to the bank, without being bound, previously, to inquire whether the persons pretending to sign as directors have been duly appointed to office, in conformity with the provisions of the memorandum and articles of association.—*W.*, in concert with some friends and dependents of his, started a company called a mining company. The Memorandum and Articles of Association were registered. Subscriptions were obtained from persons becoming shareholders, and these subscriptions were paid into a bank, which had been described in the prospectuses of the company, as the bank for the company. The bankers received a formal notice, signed by the person who described himself as the secretary of the company, that they were to pay the cheques signed by "either two of the following three directors," and countersigned by himself, in accordance with a "Resolution passed this day;" and the names of the three persons described as directors, and their signatures, were inclosed with the "Resolution." The bankers from time to time, while the business of the company appeared to be going on, received cheques signed and countersigned as described, and duly honoured them. When the fund had been almost entirely drawn out the company was ordered to be wound up. It then appeared that there never had been a meeting of shareholders, nor any appointment of directors or of a secretary, but that the persons who had got up the company had treated themselves as directors and secretary, and appropriated the money obtained from the subscriptions:—*Held*, that the official liquidator could not recover from the bankers the amount of the cheques which, under the circumstances disclosed in the case, they had thus *bonâ fide* paid.—Where those who draw and those who *bonâ fide* honour cheques, intend them to operate on a certain account, no objection can afterwards be taken that that account is not specifically mentioned on the face of the cheques.—*Per* Lord *Hatherley*: Observations on the duties of shareholders in a case of this sort. Mahony *v.* East Holyford Mining Company - - 869

BANKRUPTCY.] The concluding words of the 92nd section of the 32 & 33 Vict. c. 71 (the *Bankruptcy Act*, 1869), giving protection to payments, &c., made as therein specified, apply to a creditor of the bankrupt, and not merely to his transferee. —Where, therefore, a person sold goods to another as upon a cash credit, and just before the credit expired, received from the vendees, then on the eve of bankruptcy, payment for those goods, being, at the time of such payment, entirely without knowledge or even suspicion of the true state of the vendee's circumstances, he was held to be protected.—*S.*, a calico merchant at *Manchester*, sold calico, in September, to *M. & W.*, calico printers there, on the usual terms of the *Manchester* market, which would have made payment due on the 2nd of December. *M. & W.* were at the time of the purchase (though quite unknown to *S.*) in insolvent circumstances. In November *M. & W.* directed their manager to sell their stock-in-trade, and to pay their trade creditors. The manager

BANKRUPTCY—*continued.*
did so, and on the 22nd of November paid *S.*, taking discount and rebate of interest in the ordinary way. *M. & W.* were largely indebted to other persons for advances, and on banking accounts. On the 3rd of December, *M. & W.* filed a petition for liquidation, and a trustee was appointed. The trustee sought to get back the money which had been paid to *S.*:—*Held* (*dub.* Lord *Selborne*), that *S.* was protected as a payee "in good faith, and for valuable consideration," within the words of the 92nd section of the *Bankruptcy Act*, 1869. Butcher *v.* Stead - 839

BARONY: SUMMONS UNDER FATHER'S TITLE: *See* Peerage.

BILLS.] A promise to pay, on demand, bills upon their reaching maturity, given not upon the face of the bills themselves, but by a collateral writing, is binding to all intents and purposes on the giver of it. Overend, Gurney, & Co. (Limited) *v.* Oriental Financial Corporation (Limited) [348

BILLS ACCEPTED AND DISCOUNTED: *See* Bankers.

BILL IN EQUITY.] A bill to set aside a deed containing charges of fraud which the Court deems not to be proved, will be dismissed as to those charges, but need not be dismissed altogether, if there are other charges which the Court deems to constitute what amounts to great irregularity and legal fraud, and to require the granting of the relief prayed. Hilliard *v.* Eiffe - 39

BILLS OF SALE ACT.] The *Bills of Sale Act* (17 & 18 Vict. c. 36) declares, by the interpretation clause, fixtures to be "personal chattels," but makes them so only for particular purposes, such as are therein described, and not for all purposes and under all circumstances whatever.—*Per* Lord *Selborne*: Observations on the effect of an interpretation clause.—A mortgage of premises will pass the fixtures upon the premises. A mortgage of a lease made by the lessee will carry the fixtures of that property which is in lease, and the power to remove which fixtures was in the tenant. Fixtures attached by the mortgagor to the property after the date of the mortgage, will also (unless under special stipulations) pass to the mortgagee.—There is no difference in this respect between a mortgage in fee by a freeholder and a mortgage by way of assignment of a term by a leaseholder.—The Act is intended to operate in cases between an assignee of chattels and creditors represented by the assignee in bankruptcy, or between the assignee of chattels and an execution creditor.—*Per* Lord *Hatherley*: As to chattels attached to the property subsequently to the deposit of the lease, the mortgagee of the lease stood in the same position as his mortgagor, and those things when attached to the freehold passed during the interest that still remained in the lease.—*A.* was the lessee of a public house. On obtaining, in 1869, from *M.* a loan of £800, he deposited the lease with *M.*, together with a memorandum reciting that it was deposited as security for the loan, and for any money that might become due to *M.* for goods sold, and for the expense of "insuring the premises and the fixtures and fittings therein" from fire, and the memorandum also

BILLS OF SALE ACT—*continued.*
contained an undertaking to execute, when required, a legal mortgage. In April, 1873, *A.* borrowed a sum of £55 from *J.*, and gave *J.* a bill of sale of the fixtures and fittings. *J.* afterwards put a man in possession and advertised the fittings for sale. *M.* thereon filed a bill to restrain the sale:—*Held*, that the equitable mortgage effected in 1869 passed the fixtures and fittings, and did not require registration under the *Bills of Sale Act* (17 & 18 Vict. c. 36) to give it effect as to them. Meux *v.* Jacobs - - - - 481

BREWER'S FIXTURES: *See* Bills of Sale Act.

BROKER: *See* Stock Exchange.

1. Any person who, however innocently, obtains possession of the goods of a person who has been fraudulently deprived of them, and disposes of them, whether for his own benefit or that of any other person, is guilty of a conversion.—Where, therefore, *B.* had fraudulently obtained cotton from *F.*, and *H.* (whose ordinary business was that of a cotton broker, and who was utterly ignorant of the fraud of *B.*), purchased it from *B.* in the belief and expectation that *M.*, one of his ordinary clients, would accept it, and *M.* did afterwards accept it, though *H.* only received from *M.* a broker's commission and not a trade profit on the sale:—*Held*, that in this instance *H.* had made himself a principal, and by transferring the cotton to *M.* had committed an act of conversion, which made him liable in trover to *F.*, the real owner of the cotton.—A finding of a jury may be explained by the particular facts of the case: thus, a finding that Defendants had bought goods, as agents, in the course of their business as brokers, may be explained by the evidence that they were in business as brokers, and were in the habit of making purchases without any definite instructions from principals, and intended to purchase these goods in that way. But where the facts of the particular case shewed that they had, at the time of the purchase, no instructions from principals to make a purchase, but made it believing that it would be acceptable to persons for whom they often acted as brokers, but who were not bound to adopt the purchase, and who, if there arose any difference as to terms, could not insist on the purchase, the persons thus ordinarily acting as brokers made themselves liable to be treated as principals, and to answer in trover to the real owners of the goods.—*Stephens* v. *Elwall* (4 M. & S. 259), and *Hardman* v. *Booth* (1 H. & C. 803), approved of and acted on. Hollins *v.* Fowler 757

2. —— A custom in a particular market that a broker who has purchased, and is purchasing, goods of a particular kind, in his own name, may take portions of those goods and supply them to principals who have employed him in his character of broker to buy goods for them, is one of a peculiar nature, and cannot be supported as against a principal not proved to have been acquainted with it when he gave his order.—*Quære*, whether it applies at all except between the brokers of that particular market.—The mere fact of employing a broker to execute a commission as a broker, in a market where such a usage prevails, will not make the principal liable under it.—The rule that a usage which really changes the character of the broker and the nature of the dealing is one which

BROKER—*continued.*
cannot be supported—approved of.—*R.*, a merchant in *Liverpool*, gave orders to a tallow broker in *London* to buy certain quantities of tallow for him. The broker did not buy the specified quantities from any person, though he sent bought notes in the usual form, "Bought of *A.* on your account," but, both before and after the order, he bought from various persons, in his own name, larger quantities of tallow, proposing to allot to *R.* the quantities *R.* had desired to be bought. On *R.'s* refusal to accept he sold the tallow, and brought an action for the difference:—*Held*, that though the evidence shewed such a mode of dealing to be the usage in the *London* tallow market, the action was not maintainable against a principal who did not appear to have had knowledge of its existence. Robinson *v.* Mollett - - 802

CALLING OUT THE NAME OF A STATION: *See* Negligence. 2.
Quære, whether calling out the name of a station is an invitation to the passengers, going to that station, to alight there. Bridges *v.* North London Railway Company - - 213

CALLS: *See* Jobber.

CANAL: *See* Riparian Owner.

CARRIERS: *See* Colliery Owner.
Where goods are delivered by a vendor to a carrier to be carried to a certain place, with the added words, "for Messrs. . . . & *Co.*", these persons, thus appearing to be the consignees of the goods, may demand them of the carrier at another place; and if on such demand, and on receiving payment for the carriage, the carrier (who has not received from the vendor any special communication on the subject of the place of delivery) delivers them up to the consignees, the carrier will not be responsible to the vendor for any damages which may arise to the vendor from such delivery.—Distillers in *Cork*, who were under bond to the Crown to pay the duties on all spirits which they might be permitted to remove from one bonded warehouse to another, sold a quantity of whisky to *S. & Co.*, spirit dealers in *Limerick*. The duty on the whisky had not been paid. The distillers obtained the regular *permit* for its removal (the permit expressly describing the whisky as spirit on which duty had *not* been paid) and delivered it to a railway company to carry it to *Limerick*. The delivery note described it as sent from *Cork* to "*Customs Warehouse, Limerick.* . . . For Messrs. *J. S. & Co., Limerick Station, Limerick.*" The railway company gave a receipt note in these terms, "From, &c. . . . One puncheon of whisky addressed to *Seymour's Customs Warehouse* at *Limerick*. For *J. S. & Co.*" If it had been taken to the customs warehouse the consignees could not have obtained possession of it without having first paid the duty on it, but no special communication was made by the vendor to the carriers on this subject. Before arriving there the consignees, *J. S. & Co.*, demanded it at the railway station, and on paying the carriage obtained possession of it, and thus escaped paying the duty. The vendors were compelled under their excise bond to pay the duty, and brought an action against the carriers for the amount:—*Held*, that this was the case of an ordinary consignment; that the consignees had the right to demand the whisky from the carriers; and that the latter were not liable to make good the loss occasioned to the distillers by its delivery. Cork Distilleries Company *v.* Great Southern and Western Railway Company (Ireland) - 269

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—— *Beckett* v. *Midland Railway Company* (Law Rep. 3 C. P. 82) - - - 243
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—— *Chamberlain* v. *West of London Railway Company* (2 B. & S. 605) - - 243
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—— *Stephens* v. *Elwall* (4 M. & S. 259) - 757
—— *Trinder* v. *Trinder* (Law Rep. 1 Eq. 695) 717
—— *Wormald* v. *Maitland* (35 L. J. (Ch.) 69) 135

CERTIFICATE OF SHARES.] A certificate of shares is merely a solemn affirmation under the seal of the company that a certain amount of stock stands in the name of the individual mentioned in the certificate.—It is the duty of a person receiving, as an equitable mortgage of railway stock, the certificates of the shares thereof, to inquire what is the real position of the person pretending to mortgage it, for if such person has only the legal title by having the certificates in his possession, but is, in truth, merely the trustee for another, the equitable mortgagee will be unable to enforce his claim in opposition to the original *cestui que trust.*—*Per* The Lord Chancellor (Lord *Cairns*): In order to take away a pre-existing equitable title, something tangible and distinct, having the strong and grave effect of producing such a result, must be clearly proved to have taken place. The burden of such proof lies on the person seeking to affect the previous equitable title.—*H.*, a banker, was the banker of a railway company, he was also one of its directors. Under certain business arrangements of the company he was entrusted with the possession of certificates

CERTIFICATE OF SHARES—*continued.*

which represented shares, and those shares he held as trustee for the company; he converted the shares; the conversion was noticed; he gave an explanation, replaced the shares, and continued to hold the certificates as before, and stood on the register as the apparent owner of them. He borrowed money of *R.*, and deposited the certificates with *R.*, who held them for some time, and died without having taken any step to be registered as the owner of the shares. *R.*'s widow and executrix applied to be registered as the owner; her application was refused. She moved for a mandamus to compel registration, the Court of Queen's Bench refused the mandamus. The Exchequer Chamber reversed that decision, and ordered it to issue. On appeal to this House:—*Held*, that this was the ordinary case of a trustee abusing his trust; that if *R.* had made proper inquiries he would have found that *H.* was only a trustee; that negligence sufficient to affect their equitable title could not be imputed to the directors and the company, and that, consequently, the equitable title of *R.* could not prevail against the earlier equitable title of the company.—*Per* The Lord Chancellor:—Whether a transfer of shares in a company can or cannot be made without the production of the certificates of the shares, is a matter entirely within the discretion of the directors. Shropshire Union Railways and Canal Company *v.* Reg. - - - - 496

CHANCERY: *See* Opening a Credit.

CHATTELS: *See* Bills of Sale Act.

CHEQUES: *See* Bankers. 3.

"**CHILDREN**": *See* Will. 6.

COLLIERY OWNER.] A Railway Act (clause 66) gave the directors power to charge a sum for the conveyance of coal along the line, "including the tolls for the use of the railways and waggons, or trucks and locomotive power, and every expense incidental to such conveyance," which sum was to be a maximum sum, except in certain cases, the exception being thus expressed: "Except a reasonable sum for loading, covering, and unloading of goods, and delivery and collection, and any other services incidental to the business of a carrier, where such services, or any of them, are or is to be performed by the company." The services in respect of which the excepted charges were claimed to be made, were those of taking the waggons of a colliery owner from his own sidings and attaching them to the trains, or returning them from the line of the railway to the sidings of the colliery owner; and it was found in the special case, that whatever particular difficulty arose in this work was occasioned by the position of the points effecting the junction of the line with the sidings:—*Held*, that these were not services which came within the meaning of the exception.—At some of the stations the colliery owner had been allowed to leave his coals on the ground adjoining the lines:—*Held*, that this might have been made the subject of an agreement for payment for any advantage thus obtained by him, but did not come within the description of a "service" contained in the exception.—Another clause in the Act (clause 73) required that the company should at all times "provide sufficient locomotive

COLLIERY OWNER—*continued.*

power, when and as the same shall be required, and as soon as an adequate and sufficient load shall be in readiness, to convey all merchandise," &c. The directors required the colliery owner to furnish a declaration of his having ready fifteen waggons with a minimum load of four tons in each waggon, and gave orders not to forward his coals in a smaller number of waggons containing coals. While this restriction existed the coals of other owners were carried in smaller quantities. It was found in the case that the "regulation requiring fifteen waggons was an unreasonable requirement":—*Held*, that this restriction was not warranted by the words of the section, and that the colliery owner having suffered in his business from such restriction, was entitled to damages on that account.—The colliery owner had paid several of these sums, which in his action he sought to recover as overcharges, but he had paid them under protest, and for the purpose of obtaining possession of his goods:—*Held*, that his payment of them under such circumstances was not a fact which would disqualify him from recovering them in an action for money had and received.—The arbitrator had found upon this matter that the Plaintiff was entitled to "damages occasioned to the Plaintiff by reason of loss of customers":—*Held*, that his finding was right.—And interest upon the judgment was declared to arise on account of the delay in execution occasioned by the proceedings in Error. Lancashire and Yorkshire Railway Company *v.* Gidlow [517

COMPANY: *See* Certificates of Shares.

COMPANIES ACT, 1862.] A company, created a corporation under the *Companies Act*, 1862 (25 & 26 Vict. c. 89) is not thereby created a corporation with inherent Common Law rights.—The objects of a company proposed to be incorporated under that Act, as stated in the Memorandum of Association required by the 8th section of the Act, cannot be departed from, except so far as the 12th section permits the change. The Memorandum is the Charter of the company.—Consequently a contract made by the directors of such a company upon a matter not included in the Memorandum of Association is *ultra vires* of the directors, and is not binding on the company.—Nor can such a contract be rendered binding on the company though afterwards expressly assented to at a general meeting of shareholders. Being in its inception void, as beyond the provisions of the statute, it cannot be ratified even by the assent of the whole body of shareholders.—A company was registered under the *Joint Stock Companies Act*, 1862. Its objects, as stated in the Memorandum of Association, were these: "to make, and sell, or lend on hire, railway carriages and waggons, and all kinds of railway plant, fittings, machinery, and rolling-stock; to carry on the business of mechanical engineers and *general contractors;* to purchase, lease, work, and sell mines, minerals, land, and buildings; to purchase and sell, as merchants, timber, coal, metals, or other materials, and to buy and sell any such materials on commission or as agents." The directors agreed to purchase a conce sion for making a railway in a foreign country, and after-

COMPANIES ACT, 1862—*continued.*

wards (on account of difficulties existing by the law of that country), agreed to assign the concession to a *Société Anonyme* formed in that country, which *société* was to supply the materials for the construction of the railway, and to receive periodical payments from the English company:—*Held*, that this contract, being of a nature not included in the Memorandum of Association, was *ultra vires* not only of the directors but of the whole company, so that even the subsequent assent of the whole body of shareholders would have no power to ratify it.—Observations upon what must have been done to constitute a ratification of any contract which, though not absolutely void, as unwarranted by the Memorandum of Association, had been in excess of the powers possessed by the directors under the articles of association.—The 50th section only authorizes alterations which are within the limits provided by the Memorandum of Association. Ashbury *v.* Railway Carriage and Iron Company *v.* Riche 653

COMPENSATION: *See* Land Clauses Consolidation Act, 1845.

COMPLETION OF LINE OF RAILWAY: *See* Railway. 2.

CONDITION.] The expression of an intention accompanying a bequest does not, necessarily, constitute a condition on which the bequest is to take effect or be defeated. The testator may not do that which would fully effectuate his expressed intention, and yet the bequest may be valid. Yates *v.* University College, London - 438

CONSIGNORS AND CONSIGNEES: *See* Carriers.

CONTRACT: *See* Companies Act; Interest; Railway.

A board of health had been formed in a town. *L.* was its chairman. *M.*, a contractor, had, under the orders of the board, formed a main sewer in the town, and, under the orders of the board, had purchased pipes which would be required to be used in making the connecting drains between certain private houses and the main sewer. The board had, under the 11 & 12 Vict. c. 63, s. 69, given notice to the inhabitants of certain streets to make these connecting drains, the effect of the notice being that if the said inhabitants did not make those connecting drains the board might make them and charge the expenses on the defaulting inhabitants. The notice was disregarded. No subsequent resolution was passed by the board. *M.* was about to take away his carts and working materials, when *L.* said to him, "What objection have you to making the connections?" to which *M.* answered. "None, if you or the board will order the work, or become responsible for the payment;" and *L.* replied, "*M.*, go on and do the work, and I will see you paid." *M.* did the work, and, the board refusing to pay, sued *L.* for the amount:—*Held*, that the words of *L.* were properly left to the jury as evidence to sustain a claim against him personally, and that they did not constitute a promise to pay the debt of another, so as to come within the operation of the *Statute of Frauds*.—*Per* Lord Selborne: There can be no suretyship unless there be a principal debtor, existing at the time, or constituted by matters *ex post facto*. Lakeman *v.* Mountstephen 17

COSTS: *See* Will. 1.

A difficulty having been created by the act of the testator himself, the costs of both parties were ordered to come out of the estate. Charter *v.* Charter - - - - - 364

Where the difficulty was, in like manner, occasioned by the use in the will of the word "children," the costs were ordered to be paid out of the estate. Dorin *v.* Dorin - - 568

COURT OF INQUIRY: *See* Witness.

COVERTURE: *See* Marriage Settlement; Will. 7.

CREDIT, OPENING A: *See* Opening a Credit.

CREDITOR: *See* Bills of Sale Act.

Difference between a creditor of an intestate estate and a residuary legatee under a will or a next of kin in an intestacy. Cooper *v.* Cooper [53

CREDITORS' RESERVE OF RIGHT AGAINST SURETY.] *Semble*, that to reserve a creditors' right against a surety there must be a distinct expression of intention to reserve it. Overend, Gurney, & Co. (Limited) *v.* Oriental Financial Corporation (Limited) - - - 348

CUSTOM IN A MARKET.] A custom in a particular market that a broker who has purchased, and is purchasing, goods of a particular kind in his own name may take portions of those goods and supply them to principals who have employed him in his character of broker to buy goods for them is one of a peculiar nature, and cannot be supported as against a principal not proved to have been acquainted with it when he gave his order.—*Quære*, whether it applies at all except between the brokers of that particular market.—The mere fact of employing a broker to execute a commission as a broker in a market where such a usage prevails will not make the principal liable under it.—The rule that a usage which really changes the character of the broker and the nature of the dealing is one which cannot be supported—approved of. Robinson *v.* Mollett [802

CUSTOMS WAREHOUSE: *See* Carriers.

DEFAMATION.] No action will lie against a witness for what he says or writes when giving evidence before a Court of Justice. The rule is founded on principles of public policy. The same principle applies where a military man is bound to appear and give evidence before a military Court of Inquiry.—Where, therefore, a general in the army was called before a Court of Inquiry, assembled under the order of the General Commanding-in-Chief, to inquire into the conduct of a particular officer, made statements in evidence, and, after the close of his evidence, handed in a written paper (not called for by the Court, but having reference to the subject of the inquiry) as to the conduct of that officer, and an action was brought in respect of those statements, which were alleged to be untrue and to be malicious:—*Held*, that evidence of their falsehood and malice was immaterial and irrelevant, and that being statements made by a military man in the course of a military inquiry, in relation to the conduct of a military officer, and with reference to the subject of that inquiry, they were privileged.—A military Court of Inquiry may not be strictly

DEFAMATION—*continued.*
a judicial tribunal, but where such Court has been assembled under the orders of the General Commanding-in-Chief in conformity with the Queen's Regulations for the government of the army, a witness who gives evidence thereat stands in the same situation as a witness giving evidence before a judicial tribunal. Dawkins *v.* Lord Rokeby [744

DAMAGES: *See* Colliery Owner; Lands Clauses Consolidation Act, 1845; Real Estate.

DEED: *See* Next of Kin.

DEFEASANCE: *See* Warrant of Attorney.

DE FUTURO AGREEMENT: *See* Railway. 6.

DEVISEE: *See* Executor. 2.

DIRECTORS: *See* Bankers.

1. A direction given by persons who are directors of a company to their bankers, when the company had a balance in the hands of the bankers, to honour cheques drawn and signed in a particular manner, does not of itself impose on the directors any personal responsibility as to those cheques. This direction is in no sense a misrepresentation, so as to make personally liable those who gave it to those who acted upon it.—Nor, though that direction should continue to be acted on by the bankers after the company's account has been overdrawn, will it entail on the directors who gave it any personal liability. Nor will it entail any such liability on those who, at a subsequent meeting of the board of directors, confirmed the minutes of the board meeting at which it was given, and who drew cheques in accordance with it, though the account was overdrawn when these latter cheques were issued and honoured.—Bankers under advances to a railway company made a demand on the directors of the company to deliver to them as "security" for the advances "unissued shares" of the company, and "such preference shares and debentures as you may obtain authority to raise in next session of Parliament." This demand was not construed to mean that the shares and debentures should be paid-up shares and debentures, and the directors by delivering unissued shares and debentures (on which money had not been paid), were not guilty of any misrepresentation, and did not render themselves liable to make good to the bankers those shares and debentures. Beattie *v.* Lord Ebury . 102

2. —— Bankers who have funds of a company (formed under the *Companies Act*, 1862) in their hands may (acting *bonâ fide*) lawfully honour the cheques of the directors of the company, signed according to a form previously sent in to the bank, without being bound, previously, to inquire that the persons pretending to sign as directors have been duly appointed to office in conformity with the provisions of the memorandum and articles of association. Mahony *v.* East Holyford Mining Company - - - - - 869

DISMISSAL OF BILL: *See* Bill in Equity.

DISTRIBUTIONS, STATUTE OF: *See* Next of Kin.

EAST LONDON RAILWAY ACT: *See* Railway.

"ELDEST SON": *See* Will. 9.

ELECTION: *See* Marriage Settlement.

1. A residuary legatee under a will and next of kin under an intestacy may be subject to the rule of election.—A married woman cannot declare an election. An inquiry was therefore directed in the case of a married woman (one of two next of kin required to elect) for the purpose of ascertaining whether it was for her benefit and the benefit of her children to take under or against a will. Cooper *v.* Cooper - - - - - 53

2. —— A case of election may arise where a lady marries while an infant, and after her marriage, and after she has become of age, joins in a settlement where property of her husband is settled by him, and property of her father is settled by him, and property in which her father has a life interest, and in which she has an absolute interest in reversion, are all settled together on the trusts of the marriage, and she becomes *discoverte* and then claims the reversionary property independently of the settlement. Codrington *v.* Codrington - - - - - 854

EQUITABLE MORTGAGE: *See* Bills of Sale Act; Certificate of Shares.

EQUITY: *See* Bankers. 1; Partnership.

EVIDENCE: *See* Broker; Contract; Negligence. 2; Will. 1.

Evidence of the declarations of a testator as to whom he intended to benefit, or supposed he had benefited, can only be received where the description of the legatee, or of the thing bequeathed, is equally applicable, in all its parts, to two persons, or to two things. But evidence of the circumstances, the habits, and the state of his family at the time he made the will, is admissible, so as to put the Court in the position of the testator, in order to ascertain the bearing and application of the language which he uses, and whether there exists any person or thing to which the whole description given in the will can be, with sufficient certainty, applied.—*Forster Charter*, a Northumbrian farmer, made a will in 1859; it was drawn for him, at his request, by the vicar of the parish. The vicar knew, personally, nothing of the testator's family. The testator had had a son named *Forster Charter*, but this son died unmarried while yet under age. The second son, who thereupon became the elder surviving son, was named *William Forster Charter*. In 1850 he left home and settled in business at a place about 100 miles distant. He was never known as *Forster Charter* but was called *William* or *Willie*. In 1853 he went to *Australia*, but returned in 1856. He then resumed his former business at his previous residence, and visited his father only occasionally. It was doubtful whether they were or were not on good terms with each other. The youngest surviving son was named *Charles Charter*. He always lived with his father, except for a very short period in 1859 or 1860, when he absented himself on account of a quarrel in the family. On his return he went on as before, assisting his father, the testator, in the farm business till the father died, which was in 1869. The testator had three daughters; two were married and living away, they were not mentioned in the will. The third was unmarried, and lived with her father. Her name was *Barbara*. She was mentioned in the will, but was erroneously

EVIDENCE—*continued.*

called "*Barbara Forster*," though she had never been known by that double name. The testator's residence and farm were, in the will, left to "my son *Forster Charter*," who was made executor. This name and this description were twice repeated. The will went on to provide an annuity for the wife, to be paid "by my executor *Forster Charter*," as long as they should "reside together in the same house'; but "should they think proper to live separately" the "said *Forster Charter*" was to let her live rent free in a neighbouring cottage, and furnish her, in addition to the annuity, with necessary supplies; and in case of any dispute between them as to the supplies, the decision of *W. D.* (a near neighbour and one of the witnesses to the will) was to be final. There was a similar provision as to "*Barbara Forster*." Probate was granted by the provincial registrar to the elder surviving son, *William Forster Charter*. On a citation to recall probate, evidence was received, not only of the state, circumstances, and habits of the family, but of the declarations of the testator as to his intentions with regard to his property:—*Held*, that this latter evidence was inadmissible: *Held*, by the Lord Chancellor and Lord *Selborne*, that evidence as to the state, circumstances, and habits of the family was here admissible.—And (*diss.* Lord *Chelmsford* and Lord *Hatherley*), that the evidence of that kind here given had the effect of correcting what was thereby shewn to be a mistake in the will, *i.e.*, the name of the executor as there written; that the description of what was to be done, of the circumstances under which it was to be done, and of the person who was to act in doing it, of the place where the directions of the will were to be carried into effect, and all the circumstances connected therewith, pointed plainly to *Charles*, who had always been, and then was, resident with his father, as the person intended to carry the provisions of the will into effect; and that a mistake having been made in the use of one Christian name, which the provisions of the will and the evidence, properly admissible, had corrected, the original probate had been rightfully recalled; and that *Charles Charter* was properly and completely shewn to be the person rightfully entitled to the probate.—The difficulty having been created by the act of the testator himself, the costs of both parties were ordered to come out of the estate. Charter *v.* Charter - - - - - 364

EVIDENCE FOR JURY: *See* Negligence. 2.

EXECUTORS: *See* Partnership.

On a bill against the executors of a tradesman, all of whom were not partners in continuing his business, nor were all the partners executors, there could not be a general decree for an account of the profits of the partnership.—The testator had some freehold property: the will directed that all his real and personal estate should be vested in his trustees and executors, to convert it into personalty, and invest, &c. The executors and trustees built a villa on a part of the freehold, in the belief that they could thereby improve the value of the rest. They had no authority to do this, but as they had done it *bonâ fide* they were allowed to take the freehold property to themselves, including its value in the

EXECUTORS—*continued.*

general account.—*Jones* v. *Foxall* (15 Beav. 388; 21 L. J. (Ch.) 725) commented on. Vyse *v.* Foster - - - - - - - 318

EXECUTOR: *See* Will.

1. The question whether a person is to take as an executor or trustee only, or to have a beneficial interest under a will, is a question of intention, to be ascertained from the words of the will itself.—Where there are trusts to be performed, though they do not exhaust the fund (and then there is a general gift of residue, without any accompanying trust, to the executor), they may be taken to explain special provisions in the will exempting the executor from expense and liability. Williams *v.* Arkle - - - - - 606

2. —— An executor, who is also a devisee of an estate charged with the payment of debts, may be presumed by a *bonâ fide* purchaser or mortgagee of that estate, to be dealing with it for the purposes of the administration, and may give a valid title to *A*. Such purchaser or mortgagee, therefore, will not be bound to look to the application of the money.—Mere absence of statement of the purpose for which the money obtained by the sale or mortgage is to be used, will not make the purchaser or mortgagee liable, on the ground of a presumed knowledge that the money was to be applied otherwise than for the payment of the testator's debts.—In a case, therefore, in which the Lords were satisfied that the mortgagee himself was, as a matter of fact, entirely ignorant of any intended misapplication of the money by the executor and devisee of the estate charged, and that he had not constructive notice of it through his solicitor (who distinctly denied any knowledge or even suspicion of it):—*Held*, that though the money was entirely misapplied, the mortgage could not be treated as subject to the debts of the testator, and the mortgagee's title was not, therefore, to be postponed to the claims of the testator's creditors.—On a creditor of the testator, who impeaches the validity of the mortgage or purchase, lies the burden of proving that the mortgagee or purchaser had notice of the true state of the facts. Corser *v.* Cartwright - - - - 731

EXECUTORY DEVISE: *See* Will. 2, 3.

FINDING OF A JURY: *See* Broker. 1; Trover.

A finding of a jury may be explained by the particular facts of the case: thus, a finding that Defendants had bought goods, as agents, in the course of their business as brokers, may be explained by the evidence that they were in business as brokers, and were in the habit of making purchases without any definite instructions from principals, and intended to purchase these goods in that way. But where the facts of the particular case shewed that they had, at the time of the purchase, no instructions from principals to make a purchase, but made it believing that it would be acceptable to persons for whom they often acted as brokers, but who were not bound to adopt the purchase, and who, if there arose any difference as to terms, could not insist on the purchase, the persons thus ordinarily acting as brokers made themselves liable to be treated as principals, and to answer in trover to the real owners of the goods. Hollins *v.* Fowler - 757

FIXTURES AND FITTINGS: *See* Bills of Sale Act.

FOREIGN—SOVEREIGN OR GOVERNMENT: *See* Opening a Credit.

If a trust fund is in the Court of Chancery, that Court may proceed to administer it, even although a foreign sovereign may be interested in it, and may not think fit to come before the Court in a suit relating to it. Morgan *v.* Larivière - - - - - - 423

FRAUDS: *See* Bill in Equity; Statute of Frauds; Will. 5.

GATES ON RAILWAY: *See* Railway. 1.

GIFT OVER: *See* Will.

GIVING TIME: *See* Bankers. 2.

"GOOD FAITH": *See* Bankruptcy.

HOSPITAL: *See* Poor-rate.

HUSBAND AND WIFE: *See* Will. 7.

ILLEGITIMATE CHILDREN: *See* Will. 6.

"INJURIOUSLY AFFECTED": *See* Lands Clauses Consolidation Act, 1845. 1.

INTENTION: *See* Will.

The expression of an intention accompanying a bequest does not, necessarily, constitute a condition on which the bequest is to take effect, or to be defeated. The testator may not do that which would fully effectuate his expressed intention, and yet the bequest may be valid. Yates *v.* University College, London - - - 438

INTEREST ON A JUDGMENT: *See* Colliery Owner; Money had and received.

INTEREST, HOW CALCULATED.] Where a written security is given for the payment of money at a certain day, with interest up to that day, and the sum secured and the interest thereon are not paid at the day, the principal and interest become from that time a debt which, when recovered by legal process, may, in the discretion of a jury or of the Court, be made the subject of an additional liability, which, however, is not properly a liability to interest according to the contract, but to damages for the breach of it.—*Per* Lord *Selborne:* There is no rule of law that, upon a contract for the payment of money on a day certain, with interest at a fixed rate, down to that day, a farther contract for the continuance of the same rate of interest is to be implied. Cook *v.* Fowler - - - - - 27

INTERPRETATION CLAUSE: *See* Bills of Sale Act.

INTESTATE: *See* Next of Kin.

INVITATION TO ALIGHT AT RAILWAY STATION: *See* Negligence. 2.

IRELAND: *See* Register Acts (Ireland).

JOBBER.] A purchase or sale of shares made by one who is not a member of the *Stock Exchange*, and made through a broker who is a member of that body, will be treated as made subject to the rules of the *Stock Exchange*.—The Rules of the *Stock Exchange* imply that the name of the person

JOBBER—*continued.*

given as that of the ultimate purchaser of shares must be that of one able and willing to purchase; and they are not satisfied if the name given is that of a non-existent person, a lunatic, an infant, a married woman, or a person who has not given authority for the use of his name.—The contract of a jobber is to accept the shares, or to furnish the name of a person able and willing to accept them; and the time limited by the rules of the *Stock Exchange* for the approval or rejection of the name of the ultimate purchaser applies only to the responsibility, and not to the personal capacity and willingness of the person whose name is given.—If therefore the name given is that of one who had no legal capacity to accept the shares, though the time limited is allowed to go by without objection to him, the original contractor, the jobber, will remain liable.—*M.*, not a member of the *Stock Exchange*, directed his broker to sell certain shares of a company, and the broker sold them to a jobber, who, according to the known practice on the *Stock Exchange* sold them again (and in a similar way they passed through several hands), and the jobber (without fraud) received from his purchaser, and passed on to *M.'s* broker the name (that of *L.*) as the name of an ultimate purchaser. *M.* executed a transfer to *L.*, and received payment for the shares; *L.* turned out to be a minor legally incapable of accepting the shares; *M.'s* name (though without his knowledge) remained on the registry of the company; *L.* did not pay the subsequent calls, and *M.* was required to pay them:—*Held*, that the jobber was liable to make good to *M.* the calls which he had been compelled to pay on *L.'s* default.—*Rennie* v. *Morris* (Law Rep. 13 Eq. 203) disapproved. Nickalls *v.* Merry - - - - 530

JURY, EVIDENCE FOR: *See* Negligence. 2.

LANDS CLAUSES CONSOLIDATION ACT, 1845.] In order to found a claim to compensation under the 68th section of the *Lands Clauses Consolidation Act*, 1845, for an interest in land "injuriously affected," there must be an injury and damage, not temporary but permanent, peculiarly affecting the house or land itself in which the person claiming compensation has an interest. A mere personal inconvenience, obstruction, or damage to a man's trade or the goodwill of his business will not be sufficient, although any one of them might, but for Act of Parliament which authorizes the doing of the thing occasioning the injury, have been the subject of an action against the person occasioning it.—*Chamberlain* v. *The West of London Railway Company* (2 B. & S. 605-617) and *Beckett* v. *The Midland Railway Company* (Law Rep. 3 C. P. 82) approved. *Ricket* v. *The Metropolitan Railway Company* (Law Rep. 2 H. L. 175) explained and affirmed.—*M.* was the lessee or occupier of a house in close proximity to a draw-dock which opened into the *Thames*. He had no right, in any way, to the use of the dock, except as one of the public; but his premises being in close proximity to it, his use of it for the purposes of his business was very constant. The dock was entirely destroyed by the works of the *Thames Embankment*. *M.* sought compensation. The case submitted to the Court stated, "That

LANDS CLAUSES CONSOLIDATION ACT, 1845—*continued.*

by reason of the destruction of the dock, and the destruction thereby of the access to and from the *Thames*, the Plaintiff's premises became and were, as premises either to sell or occupy in their then condition, and with reference to the uses to which any owner or occupier might put them in their then state and condition, permanently damaged and diminished in value:"—*Held*, that the Plaintiff was, on these facts, entitled to compensation. —*Per* Lord *Penzance*: The Legislature in authorizing works and taking away any rights of action which the owner of land would have had if the works had been constructed without such authority, intended to confer on such owner a right to compensation co-extensive with the rights of action of which the statute had deprived him, but no more; not to improve the position of the person injured by the passing of the Act.—*Per* Lord *Penzance*: The right to compensation will accrue whenever it can be established that a special value attached to the premises by reason of their proximity to or relative position with the highway obstructed, and that this special value has been permanently injured by the obstruction. —Lord *O'Hagan* fully concurred with the judgment in this case, but intimated his opinion that the observations of Lord *Westbury* in *Ricket* v. *The Metropolitan Railway Company*, had laid down the correct rule for construing the 68th section of the *Lands Clauses Consolidation Act*, 1845. The Legislature never intended that the community should profit at the expense of a few of its members. Metropolitan Board of Works *v.* McCarthy - - - - - 243

2. —— The meaning of the phrase "superfluous land" in the 127th section of the *Lands Clauses Consolidation Act*, 1845 (8 & 9 Vict. c. 18) is, land acquired by the promoters of the undertaking, but not required for the purposes of the undertaking.—In the 127th section the word "required" does not mean *demanded*, but *necessary*, and when it ceases to be necessary, this land becomes superfluous land. Great Western Railway Company *v.* May - - - 283

LEASEHOLDER: *See* Mortgage. 1.

LEGATEE: *See* Next of Kin; Will. 8.

A residuary legatee under a will has a clear and tangible interest in the residue, and may therefore be subject to the application of the rule of election. Cooper *v.* Cooper - - 53

LEGITIMATE CHILDREN: *See* Will. 6.

LEVEL CROSSING: *See* Railway. 1.

LONDON TALLOW MARKET: *See* Broker. 2.

LOSS OF CUSTOMERS: *See* Railway.

MARKET: *See* Custom in a Market.

MARRIED WOMAN: *See* Election; Marriage Settlement; Will. 7.

1. A married woman possesses under 1 Vict. c. 26, no greater or different power to make a will than she possessed before that statute. The 24th section of that statute does not, retroactively, operate to give effect to her will as to property which it was not in her power to dispose of at the time when the will was made.—Without the husband's knowledge of the contents of a will made by a married woman, the will cannot be said to be made with his assent.—If a married woman, with her husband's assent, makes a will of personalty, in which she has an expectant interest, but that interest does not actually vest in her until after her husband's death, she must, to give validity to her will, re-execute it after his death. —So also if her will affects property which, (by his will made some years before and never altered,) he had bequeathed to her absolutely.—*Morwan* v. *Thompson* (3 Hag. Ec. Rep. 239) questioned.—A married woman was entitled to a sum of £3000 for her separate use; the income of a sum of £14,000 was settled upon her husband and herself for life, subject, as to the sum itself, to her appointment, if she should die before him. He had a large property of his own. In 1857 he made his will, by which he left all his property to his wife and made her sole executrix. He never altered that will. He assented to her making a will during the coverture, and, in July, 1869, she made it in a form which affected to deal with all the three sorts of property; but there was no proof that he actually knew or had assented to its contents. He died in November, 1869. She, after his death, declared to her solicitor her adherence to her will, but she did not re-execute it. She died in January, 1870:—*Held*, that her will only disposed of the property which belonged to her for her separate use; that as to the £14,000, her power of disposition had not arisen; that as to the property bequeathed by her husband, she had no power of disposition till after his death, and that her will could have no operation on that property, as it was made before her title to that property existed; that neither his assent, nor her subsequent declaration of adherence, had given validity to her will; and that in order to be valid and effectual it ought to have been duly re-executed after his death, as an original will is required to be executed under the statute. Willock *v.* Noble - - 580

2. —— A case of election may arise where a lady marries while an infant, and after her marriage, and after she has become of age, joins in a settlement where property of her husband is settled by him, and property of her father is settled by him, and property in which her father has a life interest, and in which she has an absolute interest in reversion, are all settled together on the trusts of the marriage, and she becomes *discoverte* and then claims the reversionary property independently of the settlement.—In contemplation of an intended marriage between *H. J. C.* and Miss *S.* it was agreed that certain property belonging to the lady's father, and also property of her intended husband, and a sum of 80,000 Sicca rupees in which the lady's father and mother (by the settlement made on this marriage) had life interests, and which was to belong to her absolutely after their deaths, should be settled to the uses of the marriage. No ante-nuptial settlement was made. Miss *S.* was then under age. The marriage took place. After she attained her majority a post-nuptial settlement was executed. Her husband and herself were parties of the first part. The husband and

MARRIED WOMAN—*continued.*

the father respectively brought property into the settlement in which the husband and wife were to take life interests, and the sicca rupees to which she was entitled, in reversion, for her separate use, were settled to the like trusts. The settlement stated that the lady had agreed that they should be so settled, and the husband covenanted to ratify her settlement of them, but there was no absolute covenant on her part to that effect. Before the reversion fell into possession the marriage was dissolved by the decree of the Divorce Court. When it did fall into possession the lady claimed the rupees as her absolute property, coming to her under her father and mother's marriage settlement:—*Held*, that as the post-nuptial settlement on her own marriage shewed that the rupees had formed part of the consideration for the settlement therein of the other property, from which she had derived benefit, she must elect to take under or against it.—A special order directing how the accounts under the election were to be taken. Codrington *v.* Codrington - - - - - - 854

MEMORANDUM OF ASSOCIATION: *See* Directors. 1, 2.

A company, created a corporation under the *Companies Act*, 1862 (25 & 26 Vict. c. 89), is not thereby created a corporation with inherent Common Law rights.—The objects of a company proposed to be incorporated under that Act, as stated in the Memorandum of Association required by the 8th section of the Act, cannot be departed from, except so far as the 12th section permits the change. The Memorandum is the Charter of the company.—Consequently a contract made by the directors of such a company upon a matter not included in the Memorandum of Association is *ultra vires* of the directors, and is not binding on the company.—Nor can such a contract be rendered binding on the company though afterwards expressly assented to at a general meeting of shareholders. Being in its inception void, as beyond the provisions of the statute, it cannot be ratified even by the assent of the whole body of shareholders. Ashbury Railway Carriage and Iron Company *v.* Riche - - - - 653

MILITARY LAW: *See* Witness.

MISREPRESENTATION: *See* Directors.

If a man misrepresents a fact, to that fact he is bound, if any other person, misled by such misrepresentation, acts upon it, and thereby suffers damage. Beattie *v.* Lord Ebury 102

MONEY HAD AND RECEIVED.] A colliery owner had, under protest, paid at different times various sums of money, which he complained of as overcharges:—*Held*, that he was entitled to recover them in an action for money had and received. Lancashire and Yorkshire Railway *v.* Gidlow - - - - - - 517

Interest was held recoverable under this claim. *Ib.*

MORTGAGE: *See* Bills of Sale Act; Register Acts (Ireland).

1. A mortgage of premises will pass the fixtures upon the premises. A mortgage of a lease made by the lessee will carry the fixtures of that property which is in lease, and the power to remove

MORTGAGE—*continued.*

which fixtures was in the tenant. Fixtures attached by the mortgagor to the property after the date of the mortgage, will also (unless under special stipulations) pass to the mortgagee. Meux *v.* Jacobs - - - - - 481

There is no difference in this respect between a mortgage in fee by a freeholder and a mortgage by way of assignment of a term by a leaseholder. *Ib.*

2. —— An executor, who is also a devisee of an estate charged with the payment of debts, may be presumed, by a *bonâ fide* purchaser or mortgagee of that estate, to be dealing with it for the purposes of the administration, and may give a valid title to it. Such purchaser or mortgagee, therefore, will not be bound to look to the application of the money.—Mere absence of statement of the purpose for which the money obtained by the sale or mortgage is to be used, will not make the purchaser or mortgagee liable, on the ground of a presumed knowledge that the money was to be applied otherwise than for the payment of the testator's debts.—In a case, therefore, in which the Lords were satisfied that the mortgagee himself was, as a matter of fact, entirely ignorant of any intended misapplication of the money by the executor and devisee of the estate charged, and that he had not constructive notice of it through his solicitor (who distinctly denied any knowledge or even suspicion of it):—*Held*, that though the money was entirely misapplied, the mortgage could not be treated as subject to the debts of the testator, and the mortgagee's title was not, therefore, to be postponed to the claims of the testator's creditors.—On a creditor of the testator, who impeaches the validity of the mortgage or purchase, lies the burden of proving that the mortgagee or purchaser had notice of the true state of the facts. Corser *v.* Cartwright [731

NAME IN A WILL: *See* Will. 1.

NEGLIGENCE.] Where a railway crosses a public highway on the level, and there are (under the 8 Vict. c. 20, s. 47) gates for the protection of "horses, cattle, carts, or carriages," passing along the highway, it is the duty of the railway company's servants to keep them closed when any train is approaching. If this duty is not performed, and a passenger along the highway is, in attempting to cross the line of railway, injured, the leaving of the gates open is, in an action brought by him, evidence of negligence to go to the jury. It is so, even though, with care and circumspection, he might have been able to see, at a distance, the approach of the train which occasioned the injury.—*Per* The Lord Chancellor (Lord *Cairns*): The gates of the railway, at a place where it crossed the highway at a level, being open, amounted to a statement, and a notice to the public, that the line, at that time, was safe for crossing. North Eastern Railway *v.* Wanless [12

2. —— *B.* was in the last carriage of a railway train. Before reaching the station at which he was to alight the train had to pass through a tunnel. In that tunnel there was, first, a heap of hard rubbish lying by the side of the rails, irregular in form and height, then a short sloping

NEGLIGENCE—*continued.*

piece of ground, then a piece of flat platform, like the main platform, but narrower, and within the tunnel. Beyond these was the main platform itself. The train only partially went up to the main platform, leaving the last two carriages within the tunnel, which had no light within it, and on the occasion in question was filled with steam. The last carriage but one came opposite the narrow platform, the last carriage was opposite the hard rubbish. A passenger in the last carriage but one (who was called as a witness at the trial) heard the name of the station called out in the usual way and got out upon the narrow platform. He then heard a groaning, and proceeding farther back into the tunnel found *B.* lying on the rubbish with his legs between the wheels of the last carriage, but neither of them had touched him. *B.'s* leg was broken, and he had received other injuries, from the effects of all of which he died. The witness heard the warning, "Keep your seats," and shortly afterwards the train moved on.—On these facts the learned Judge at the trial held that there was no evidence of negligence to go to the jury, and he directed a nonsuit. Owing to a strong expression of opinion by the jurymen he took their finding (on the assumption that there ought to be a verdict for the Plaintiff) as to the amount of damages. The nonsuit was then entered, with leave to move to enter the verdict for the damages assessed:—*Held*, that the ruling at Nisi Prius could not be sustained; that the case ought not to have been withdrawn from the consideration of the jury, for that the evidence furnished matter on which it was necessary to take the opinion of a jury.—*Quære*, whether calling out the name of a station is an invitation to the passengers, going to that station, to alight there. Bridges *v.* North London Railway - - - - - 213

NEW TRIAL.] Where there had been a rule to shew cause why a verdict should not be set aside, and a new trial granted, a decision to enter a judgment in opposition to that verdict is wholly irregular. Fulton *v.* Andrew - - 448

NEXT OF KIN.] The rule of the *Statute of Distributions* which requires the conversion of an intestate's estate into money is introduced simply for the benefit of creditors, and the facility of division among the next of kin. But, as regards the substantial title to property, the right of the next of kin (subject only to the claims of creditors) is complete.—A residuary legatee under a will has a clear and tangible interest in the residue, and the *Statute of Distributions* being nothing but a will made by the Legislature for an intestate, his next of kin stand, with regard to his personal estate, in the same condition as does a residuary legatee under a will:—Both may therefore be subject to the rule of election.—In these respects a creditor does not resemble either.—A married woman cannot declare an election. An inquiry was therefore directed in the case of a married woman (one of two next of kin required to elect) for the purpose of ascertaining whether it was for her benefit and the benefit of her children to take under or against a will.—*A.* gave a certain estate, *P. H.* (together with personal property), to trustees on trust, after his

NEXT OF KIN—*continued.*

widow's death, to sell, and hold the proceeds, with his other property, in trust for any one of his children in such form and manner as his widow, before a certain fixed period, should appoint. *A.* died, leaving three sons, *W. H.*, *R. E.*, and *F. J.* Before the expiration of the fixed period the widow executed a deed by which, after disposing of other property, she directed the proceeds of *P. H.* to be divided equally among the three sons. The deed reserved to her a power of revocation. She afterwards, believing that she still possessed power to dispose of the estate, made a will, by which she gave this estate of *P. H.* to *W. H.*, the eldest son, and then, by different successive codicils, gave benefits to the other two sons, and a special legacy to each of the two children of *R. E.* (the only one of the three sons of the original testator who had married). *R. E.* died before his mother, and died intestate. On her death a suit was instituted, in which it was declared that, so far as the estate of *P. H.* was concerned, her will (which could only speak from the date of her death, and therefore long after the expiration of the period fixed for the making of the appointment) was inoperative. *W. H.* then filed a bill to compel the two children of *R. E.*, and also his youngest brother, *F. J.*, to elect between their claims under the deed of appointment and under the will and codicils. *F. J.* submitted; the two children of *R. E.* resisted:—*Held*, that their rights under the deed of appointment, though derived through their father, were exactly the same as were those of *F. J.*, and that they were bound to elect:—*Held*, also, that the special legacies to the two children of *R. E.*, though given to them by name, and given before his death, must be taken into account together with the interest which they derived through him as his next of kin, the whole of the benefits to be taken under the two titles being subject to election.—A special direction was inserted in the Order of the House as to the mode of taking the account with reference to the administration of the estate of *R. E.* Cooper *v.* Cooper - 53

NONSUIT: *See* Negligence. 2.

NOTICE: *See* Practice. 1; Probate. 1.

NOTICE OF SAFETY ON RAILWAYS: *See* Negligence. 1, 2.

OPENING A CREDIT.] A writing opening a credit for a particular sum cannot, of itself, constitute an equitable assignment or specific appropriation of that sum, so as to create a trust. It is a mere statement that the person writing it will act as paymaster to the person to whom it is written, up to a certain amount, on his performing the conditions set forth in it.—*L.* entered into a contract (dated the 30th of November, 1870) with the French Minister of War, represented by *J.*, his delegate at *London*, to supply 20,000,000 of ball cartridges of a certain quality, the whole to be supplied by the 10th of January, 1871. Time was to be considered of the essence of the contract. *L.* desired some arrangements to be made as to payment. *M. & Co.*, who acted in *London* as financial agents for the French Government, wrote to *L.* a letter dated the 1st of

OPENING A CREDIT—*continued.*

December, 1870, in these terms:—"We are instructed by *J.* to advise you that a special credit for the sum of £40,000 has been opened with us in your favour, and that it will be paid to you rateably as the goods are delivered, upon receipt of certificate of reception issued by the French Ambassador or by *J.*" The goods were not delivered according to the contract. Morgan *v.* Larivière - - - - - 423

PAROCHIAL RATE: *See* Railway. 2.

PARTICULARS IN CONTENTIOUS PROCEEDINGS IN THE PROBATE COURT: *See* Practice. 7.

PARTNERSHIP: *See* Railway. 6.

R. V. was the chief partner in a large and prosperous trade. By the articles of partnership (which were to take effect from the 30th of June, 1853), the cash accounts were to be balanced monthly, the stock and the value of each partner's share were to be ascertained on the 30th of June in each year, and be written into as many books as there were partners, and each partner was to sign and to possess one book, and be bound thereby. If any partner should die, the partnership as to him was to cease, and his share was to be divided among his surviving partners in proportion to their existing shares, and the value of his share was to be ascertained as at the last stock taking, and it was to be paid for by promissory notes payable at six, twelve, eighteen, and twenty-four months date; and the surviving partners were to execute a covenant of indemnity to the estate of the deceased partner, whose executors were to execute a transfer of his share. *R. V.* died shortly after the stock-taking of 1855, but before the results of it had been duly made up and entered in books. *R. V.* had, by his will, appointed his brother (then one of his partners) to be one of his executors; another executor was his eldest son, who was not then a partner, but afterwards became so. He directed a sale of his real property, its produce to form part of his personal estate, which he directed to be converted into money and divided equally among his children; as to the males, part at twenty-one, the remainder at twenty-five; as to the females, at twenty-five, with a provision for maintenance in the meantime. The articles of partnership were acted upon as to the mode of taking the partnership accounts, and so were the directions in the will so far as to the payment of interest on capital, but no promissory notes were given by the partners, nor any covenant of indemnity executed. The shares of the children were duly allotted, and their intermediate allowances paid, but the real estate was not sold, nor the personal estate converted, the money to which the testator had been entitled being really permitted to remain in the trade, accounts of profits being duly kept and appropriations to the various children regularly made. The youngest child, on arriving at twenty-five years of age, filed a bill against the executors as for a breach of trust in not executing the directions in the will; and she prayed for accounts and a declaration of her liberty to elect between the receipt of profits and the receipt of

PARTNERSHIP—*continued.*

interest on the money that ought to have been invested:—*Held*, that the bill was not sustainable; that the will could not affect the articles of partnership; that those articles constituted a contract for the sale of the testator's share to his partners, though the time for the sale was not fixed; that the giving of the promissory notes by the partners in the concern to the executors, some of the persons filling both characters, would have been a useless formality; that mere delay in the payment of the value of the share did not affect the validity of the contract; and that no misconduct in fact being established, the bill must be dismissed.—*Per* Lord *Hatherley*: Time was not, here, of the essence of the contract.—There were other partners in the business besides those who were executors:—*Held*, that on a bill against the executors, all of whom were not partners, nor were all the partners executors, there could not be a general decree for an account of the profits of the partnership.—The testator had some freehold property: the will directed that all his real and personal estate should be vested in his trustees and executors, to convert it into personalty, and invest, &c. The executors and trustees built a villa on a part of the freehold, in the belief that they could thereby improve the value of the rest. They had no authority to do this, but as they had done it *bonâ fide*, they were allowed to take the freehold property to themselves, including its value in the general account.—*Jones* v. *Foxall* (15 Beav. 388; 21 L. J. (Ch.) 725) commented on. Vyse *v.* Foster - - - - 318

PAYEE: *See* Bankruptcy.

PEERAGE.] An attainder was pronounced, in 1538–9, against *Margaret P.* and against her son *Henry P.* He was beheaded in that year. She was for a time spared. She united in her own person three baronies, described as having been created by writs of summons and sittings—*Montacute* (1299), *Monthermer* (1309), and *Montacute* (second of that name, 1357). By the ordinary course of descent *Henry P.* would have succeeded to these baronies had he survived his mother. He had himself sat in Parliament under the title of *Henry P.*, Lord *Montague*, and was so described in the Inquisition taken after his execution in 1539. The attainder against his mother was, by *Henry* VIII., put in force in 1541, when she was beheaded. In 1553 an Act of Parliament was passed (1 Mary, sess. 2, c. 1), intituled, "An Act for the Restitution in Blood of the heirs of *Henry Pole*, late Lord *Montague*." The Act, a private Act, was in the form of a petition to the Queen from the two ladies *Katherine* and *Winifred*, the only children of *Henry P.* It recited his attainder, and prayed that they and their heirs might be restored and enabled *onely* in blood as daughters and heirs of *Henry*, &c., and enabled to demand, ask, have, hold, and enjoy all such honours, castles, manors, lordships, &c., and all other manner of hereditaments, &c., which at any time shall come, remain, descend, or revert from any lineal or collateral ancestor of "your said subjects," &c., "other than such castles, manors, lordships, &c., which were of the said *Henry P.* in possession, reversion, remainder, or otherwise," at

PEERAGE—*continued.*

the day of his attainder. *Margaret P.* was not mentioned in the Act:—*Held*, that this Act had no effect on the attainder of *Margaret*, which still remained in full force. It only entitled the two ladies and their heirs to claim inheritances which they might derive from persons as against whose succession the attainder of *Henry Pole* himself would have been an obstacle. There was, therefore, no succession to the first three peerages, which must be traced through *Margaret*:—*Held*, also, that it was, at least, highly probable that the barony of *Montague*, by which title *Henry P.* had sat in Parliament, was (with a mere change of the spelling of the name) one of those held by his mother, and for which he had received a writ of summons in her lifetime; and that the Act 1 Mary, which was not a reversal of his attainder, but only an Act for the restitution in blood of his heirs, had no effect on the barony in respect of which he had sat in Parliament.—*Per* The Lord Chancellor (Lord *Cairns*) and Lord *Hatherley*: The fact that a son was sitting in Parliament by writ of summons in virtue of a barony belonging to a parent, would not, if that parent was attainted, save that barony from the consequences of that attainder. The Montacute and Monthermer Peerages - - - - - 305

PERMANENT AGREEMENT: *See* Railway. 6.

PERSONAL CHATTELS: *See* Bills of Sale Act.

PLEADING: *See* Bill in Equity.

POOR-RATE.] *St. Thomas' Hospital* was founded by charter of *Edward* VI., and lands were given, and the funds arising from the property vested, for the purposes of the charter, in the mayor and corporation of *London*. The charter directed the appointment and payment of the officers necessary for such an establishment, and directed that the residue of the revenues should be spent for "the use and maintenance of the poor, sick, and infirm folk of the said hospital":—*Held*, that the rule laid down in the cases of *The Mersey Docks* v. *Cameron* (11 H. L. C. 443) and *Greig* v. *The University of Edinburgh* (Law Rep. 1 H. L., Sc. 348) applied here; and that *St. Thomas' Hospital* was liable to be rated to the relief of the poor of the parish. Mayor of London *v.* Stratton - 477

PRACTICE.] Where, in a bill to set aside the grant of an annuity made by *A.* to *B.*, and charged upon *A.*'s land (with also a personal covenant for payment), the Plaintiff is himself the devisee as well as residuary legatee under *A.*'s will, he ought, under the 20 & 21 Vict. c. 79, s. 68 (*Ir.*), to give notice to the other party that he intends to give in evidence as proof of the devise or testamentary disposition, the probate of the will. But if he should fail to give this notice, the omission would only create a technical difficulty in the case, and the Court might, properly, and would adjourn the hearing to give an opportunity to remove that technical difficulty.—Where in such a case the objection was likewise made that the Plaintiff was legatee and had not proved the assent of the executor to the legacy, nor his insolvency, nor his refusal to sue, nor collusion on his part; but the Vice-Chancellor overruled the objection (relying on the case of *Consett* v. *Bell* (1 Y. & C. C. C. 569)), and the Defendant, though carrying the case to the Court of Appeal in Chancery, did not present to that Court this or the previous objection to the Vice-Chancellor's decision:—*Held*, that he could not afterwards, on bringing up the case to this House, present these objections in argument as objections which might be made here to the decision of the Court of Appeal. Hilliard *v.* Eiffe - - - - - 39

PRACTICE—*continued.*

2. —— A married woman cannot declare an election. An inquiry was therefore directed in the case of a married woman (one of two next of kin required to elect) for the purpose of ascertaining whether it was for her benefit and the benefit of her children to take under or against a will. Cooper *v.* Cooper - - - - 53

3. —— A special direction was inserted in an order with reference to taking the accounts of the administration of the estate of an intestate whose representatives were called on to elect between a will and a deed of appointment. Cooper *v.* Cooper - - - - - 53

4. —— An Order of the House directed the officers of a railway company to take all proper measures for cancelling a registration of unissued railway shares which had only been given to bankers as "collateral security" for their advances to the directors of the railway. But the order on the bankers, the Appellants, to pay costs, on the dismissal of their appeal, was not postponed till the bankers' names had been taken off the register. Beattie *v.* Lord Ebury - 102

5. —— Observations on the form of a decree for taking the accounts in a case of contested priority under the Irish Registry Acts. Agra Bank *v.* Barry - - - - 135

6. —— The House will not, on the application of a person not an Appellant against a decree, make an alteration in it. If a change in the details of the decree should be necessary, his application for it should be made in the Court below. Yates *v.* University College, London - 438

7. —— Where there had been a rule to shew cause why a verdict should not be set aside and a new trial granted, a decision to enter a judgment in opposition to that verdict is wholly irregular. Fulton *v.* Andrew - - - - 448

PREFERENCE SHARES.] Where bankers have demanded and received unissued preference shares of a railway company as "collateral security" for advances they have made on the company's cheques, and have been registered on the registry of the company as the holders of such shares, a Court of Equity will examine into the circumstances of the transaction, and can direct the proper steps to be taken to cancel such registration. Beattie *v.* Lord Ebury - - 102

PRINCIPAL AND AGENT: *See* Bankers. 2; Broker.

PRINCIPAL AND SURETY.] If, after a right of action accrues to a creditor against two or more persons, he is informed that one of them is a surety only, and, after that, he gives time to the principal debtor, without the consent and knowledge of the surety, the rule as to the discharge of the

PRINCIPAL AND SURETY—*continued.*

surety applies.—*McH.* brought to *O. & G.* (a discount company) certain bills, which bore on them the acceptances of the *F. Co.* *McH.* was in fact the agent of the *A. & G. W. Co.* (an American company), and he and this American company had obtained the acceptances for their own accommodation, and on payment of a commission in respect of such acceptances. The bills were not paid, but renewed. *McH.* gave the *O. & G. Co.* his own guarantie and that of the American company that these renewed bills should be paid at maturity. These renewed bills were not paid, The *O. & G. Co.* gave, on the 6th of April, 1866, notice of dishonour to all the parties whose names were on the bills. On the 9th of April the solicitor of the *F. Co.* gave full information to the *O. & G. Co.* that *McH.* was the real principal on the bills, which had been accepted by the *F. Co.* merely for his accommodation. The manager of the *O. & G. Co.* said he should see *McH.* in the afternoon. *McH.* afterwards gave, as collateral security, to the *O. & G. Co.* bills to a much larger amount, drawn on one *L. L.*, and the *O. & G. Co.* entered into an arrangement with *McH.* not to sue on the old bills if the bills on *L. L.* should be paid. Nothing farther was done in the matter for some months. These last bills were not paid, and the *O. & G. Co.* afterwards brought an action against the *F. Co.* to recover the amount of the bills originally accepted by the *F. Co.* The *F. Co.* filed a bill to restrain the action:—*Held*, that under all the circumstances, the action must be restrained, for that the *O. & G. Co.*, with a knowledge of the real character of the *F. Co.'s* acceptances, had given time to *McH.*, whom they knew to be the real principal on the bills, and had so discharged the *F. Co.*—Merely giving of additional security, by a principal, will not discharge a surety, but if the giving of such security is really a consideration for giving time to the principal, it will do so.—*Semble*, that to reserve a creditor's right against a surety there must be a distinct expression of intention to reserve it. Overends, Gurney, and Company (Limited) *v.* The Oriental Financial Corporation (Limited) - 348

PRIVATE ACT OF PARLIAMENT: *See* Railway. 4.

Where under the *Railways Clauses Consolidation Act*, 1845 (s. 127) the title to land as "superfluous land" had become "vested" in any adjoining owner, private Acts of the company passed to extend the time for selling such land did not affect the adjoining owner's right, although at the time when they were passed he had not put in any claim to possess it. Great Western Railway Company *v.* May - - - 283

PROBATE: *See* Evidence; Will.

1. A devisee of real estate in *Ireland*, taking proceedings there against any person claiming an interest in such real estate ought (under the 20 & 21 Vict. c. 79, s. 68) to give to the Defendant notice that he intends to give in evidence, as proof of the devise or testamentary disposition, the probate of the will. His omission to do so will, however, only create a technical difficulty, and the Court may properly, and will adjourn the hearing to give an opportunity to remove that difficulty. Hilliard *v.* Eiffe - - 39

2. —— A will was propounded for probate.

PROBATE—*continued.*

A caveat was entered. The Court of Probate directed the case to be tried at the assizes; it was so tried on six issues. The first four required a determination of the fact whether the testator was of sound mind and understanding, capable of making a will; the fifth, whether he knew and approved of the contents of the will; the sixth, whether he knew and approved of the residuary clause. That clause was the last in the will, and, by it, the propounders of the will were made the residuary legatees, and were appointed executors. Evidence having been taken, the Judge at the trial asked the opinion of the jurors on every one of the issues. They found for the propounders of the will on the first five issues, but for the opponents on the sixth. No leave to set aside the verdict and enter judgment for the propounders, notwithstanding the verdict on the sixth issue, was reserved, but when the case came before the Court of Probate a rule was obtained to set aside the verdict generally, and have a new trial, or to set aside the verdict on the sixth issue for misdirection. On argument, the Judge of the Court of Probate made the rule absolute to enter the verdict for the propounders of the will, and granted probate of the whole will, including the residuary clause:—*Held*, that this judgment was irregular, and could not be sustained.—By the 40th Rule of Proceeding in the Probate Court (1865), made as to contentious business, it is required that any party having pleaded certain pleas as to the competency of the testator and the validity of the execution of the will, shall give particulars in writing, stating shortly the substance of the case he intends to present to the Court, and no other defence shall be available. The particulars delivered in this case set forth that, "at the time of the execution of the alleged will the deceased was in a state of mental prostration brought on by habitual drunkenness and disease of the brain, and that when he executed the alleged will he was not conscious of, and did not approve of, the contents of the alleged will or of the residuary clause":—*Held*, that these particulars could not be construed as restricting the Defendants to proof that the non-approval of the residuary clause was alone occasioned by mental prostration brought on by habitual drunkenness and disease of the brain:—*Per* Lord *Hatherley*: Those who take a benefit under a will, and have been instrumental in preparing or obtaining it, have thrown upon them the onus of shewing the righteousness of the transaction.—There is no unyielding rule of law (especially where the ingredient of fraud enters into the case) that, when it has been proved that a testator, competent in mind, has had a will read over to him, and has thereupon executed it, all farther inquiry is shut out. Fulton *v.* Andrew - - - 448

PROMISE TO PAY: *See* Statute of Frauds.

PUBLICANS' FIXTURES AND FITTINGS: *See* Bills of Sale Act.

RAILWAY: *See* Negligence.

1. Where a railway crosses a public highway on the level, and there are (under the 8 Vict. c. 20, s. 47) gates for the protection of "horses, cattle, carts, or carriages," passing along the highway, it

RAILWAY—*continued.*

is the duty of the railway company's servants to keep them closed when any train is approaching. If this duty is not performed, and a passenger along the highway is, in attempting to cross the line of railway, injured, the leaving of the gates open is, in an action brought by him, evidence of negligence to go to the jury. It is so, even though, with care and circumspection, he might have been able to see, at a distance, the approach of the train which occasioned the injury.—*Per* The Lord Chancellor (Lord *Cairns*): The gates of the railway, at a place where it crossed the highway at a level, being open, amounted to a statement, and a notice to the public, that the line, at that time, was safe for crossing. North Eastern Railway Company *v.* Wanless - - 12

2. —— The *East London Railway Act*, 1865 (28 & 29 Vict. c. li.), authorized the making of several small railways, and the taking possession of lands for that purpose. Each of these railways passed through more than one parish. The 128th clause of the Act declared, "That if and while the company are possessed under this Act of any lands assessed, or liable to be assessed, to any sewers rate, consolidated rate, poor rate, police rate, main drainage rate, church rate, or other parochial or ward rate, they shall, from time to time, until the railway or the works thereof are completed and assessed, or liable to be assessed, be liable to make good the deficiency in the assessment for such rates, by reason of those lands being taken or used for the purposes of the railway or works; and the deficiency shall be computed according to the rental at which those lands with any buildings thereon are now rated." A portion of one of these railways was completely constructed in one parish, and was worked there. Till its completion there, the directors had paid in that parish the deficiency rate as provided in this clause. On its completion there, they claimed that they should be relieved from the deficiency rate:—*Held* (reversing the judgment of the Exchequer Chamber, and restoring that of the Court of Exchequer), that the rate was properly a parochial rate, and that, on the completion of that portion of the railway in that parish the title of the parish officers to claim the deficiency rate there had ceased.—*Reg.* v. *Metropolitan District Company* (Law Rep. 6 Q. B. 698) overruled.—Observations on special clauses of arrangement introduced into Railway Acts. East London Railway Company *v.* Whitechurch - 81

3. —— Bankers under advances to a railway company made a demand on the directors of the company to deliver to them, as "security" for the advances, "unissued shares" of the company, and "such preference shares and debentures as you may obtain authority to raise in next session of Parliament." This demand was not construed to mean that the shares and debentures should be paid-up shares and debentures; and the directors, by delivering unissued shares and debentures (on which money had not been paid), were not guilty of any misrepresentation, and did not render themselves liable to make good to the bankers those shares and debentures.—Where bankers have demanded and received unissued preference shares of a railway company as "collateral security"

RAILWAY—*continued.*

for advances they have made on the company's cheques, and have been registered on the registry of the company as the holders of such shares, a Court of Equity will examine into the circumstances of the transaction, and can direct the proper steps to be taken to cancel such registration.—The Order of the House directed the officers of the railway company to take all proper measures for cancelling the registration. But the order on the Appellants to pay costs was not postponed till the bankers' names had been taken off the register. Beattie *v.* Lord Ebury - - - 102

4. —— The meaning of the phrase "superfluous land" in the 127th section of the *Lands Clauses Consolidation Act*, 1845 (8 & 9 Vict. c. 18) is, land acquired by the promoters of the undertaking, but not required for the purposes of the undertaking.—In the 127th section the word "required" does not mean *demanded*, but *necessary*, and when it ceases to be necessary this land becomes superfluous land.—It may be so in any one of four ways: if more land had been taken than, on the execution of the works, appeared to be needed—if the company had been forced to take it by reason of not being able to obtain a part of any property without taking the rest—if taken for works then deemed to be required for permanent use, but which afterwards were found not to be required, and were therefore abandoned—or, if taken only for a temporary purpose, when that temporary purpose had been answered.—The conversion of it to other purposes than those of the undertaking is evidence of its being superfluous. Though land acquired for the purposes of the undertaking has been actually used by the promoters, if that use is only one of a temporary nature, the land having satisfied that use becomes superfluous land.—Where land cannot be shewn to be required for the purposes of the undertaking, it vests absolutely in the adjoining owner under the 127th section of the *Lands Clauses Consolidation Act*, 1845; having so become "vested" in the adjoining owners, it is not affected by the circumstance that a private Act, passed afterwards, though before it is claimed by an adjoining owner, extends the time within which the directors may dispose of the superfluous lands belonging to the company.—Lands were acquired by railway directors, as for the purposes of their undertaking, notices under the compulsory powers clauses being given as to all—but the valuation as to some was fixed by the statutory arbitrator, as to the rest settled by agreement between the directors and the landowners. At the end of ten years the purposes to which the directors had applied certain portions of the lands thus acquired had been answered, and the directors allowed persons to occupy these particular portions as garden grounds, still, however, retaining a right of re-entry thereon on very short notices. An adjoining owner claimed them under the 127th section of the *Lands Clauses Consolidation Act*, 1845:—*Held*, that his claim was valid, that they had become "superfluous land" and had "vested" in him, within the meaning of the section, and it had not been necessary for him to do any act to bring about that legal result. Great Western Railway Company *v.* May - 283

RAILWAY—*continued.*

5. —— A Railway Act (clause 66) gave the directors power to charge a sum for the conveyance of coal along the line, "including the tolls for the use of the railways and waggons, or trucks and locomotive power, and every expense incidental to such conveyance," which sum was to be a maximum sum, except in certain cases, the exception being thus expressed: "Except a reasonable sum for loading, covering, and unloading of goods, and delivery and collection, and any other services incidental to the business of a carrier, whether such services, or any of them, are or is to be performed by the company." The services in respect of which the excepted charges were claimed to be made were those of taking the waggons of a colliery owner from his own sidings and attaching them to the trains, or returning them from the line of the railway to the sidings of the colliery owner; and it was found in the special case, that whatever particular difficulty arose in this work was occasioned by the position of the points effecting the junction of the line with the sidings:—*Held*, that these were not services which came within the meaning of the exception.—At some of the stations the colliery owner had been allowed to leave his coals on the ground adjoining the lines:—*Held*, that this might have been made the subject of an agreement for payment for any advantage thus obtained by him, but did not come within the description of a "service" contained in the exception.—Another clause in the Act (clause 73) required that the company should at all times "provide sufficient locomotive power, when and as the same shall be required, and as soon as an adequate and sufficient load shall be in readiness, to convey all merchandise," &c. The directors required the colliery owner to furnish a declaration of his having ready fifteen waggons with a minimum load of four tons in each waggon, and gave orders not to forward his coals in a smaller number of waggons containing coals. While this restriction existed the coals of other owners were carried in smaller quantities. It was found in the case that the "regulation requiring fifteen waggons was an unreasonable requirement":—*Held*, that this restriction was not warranted by the words of the section, and that the colliery owner having suffered in his business from such restriction, was entitled to damages on that account.—The colliery owner had paid several of these sums, which in his action he sought to recover as overcharges, but he had paid them under protest, and for the purpose of obtaining possession of his goods:—*Held*, that his payment of them under such circumstances was not a fact which would disqualify him from recovering them in an action for money had and received.—The arbitrator had found upon this matter that the Plaintiff was entitled to "damages occasioned to the Plaintiff by reason of loss of customers":—*Held*, that his finding was right.—And interest upon the judgment was declared to arise on account of this delay in execution occasioned by the proceedings in Error. Lancashire and Yorkshire Railway Company *v.* Gidlow - - - - 517

6. —— By an agreement entered into between the directors of two railway companies,

RAILWAY—*continued.*

the *N. W. Co.* was to have running powers over the *L. Co.'s* lines, subject to the *L. Co.'s* bye-laws; was to be at liberty to have its own staff at the *L. Co.'s* stations, and be allowed a reasonable sum for cartage, clerkage, &c.; the *L. Co.* was to be at liberty to call on the *N. W. Co.* to carry passengers and goods for the *L. Co.* upon the *L. Co.'s* local lines, and both sets of directors bound themselves to send by each other's lines all traffic not otherwise consigned. A chief consideration for this agreement was an advance of money by the *N. W.* directors to the *L. Co.'s* directors; but no mention of this consideration was made in the agreement. Nor, though there were in the agreement provisions for referring to arbitration any differences that might arise as to the agreement, was there any mention of any time for which it was to endure, or how it might be terminated:—*Held*, that all the provisions of the agreement shewed that it was a permanent and not a terminable agreement; and that, consequently, a notice to terminate it at the end of six months from a given time was invalid.—Such an agreement appeared to be authorized by the 87th section of the *Railways Clauses Act* of 1845 (8 & 9 Vict. c. 20); and, *semble*, that any differences arising between the two companies occasioned by any hardship felt in the working of the agreement, on either side, might be made the subject of arbitration under the 22 & 23 Vict. c. 59.—An agreement of this kind in no way resembles contracts of partnership, or of hiring and service.—*Per* Lord *Selborne:* An agreement *de futuro*, extending over a tract of time which, on the face of the instrument, is indefinite and unlimited, throws upon a person alleging it not to be perpetual, the burden of proving that allegation. Llanelly Railway and Dock Company *v.* London and North-Western Railway Company - - - - - 550

RATIFICATION: *See* Companies Act.

RATING: *See* Railway. 2.

REAL ESTATE: *See* Bills of Sale Act; Executor; Mortgage.

Upon a contract for the sale and purchase of a real estate, if the vendor, without fraud, is incapable of making a good title, the proposing purchaser is not entitled to recover compensation in damages for the loss of his bargain.—*F.* was in possession of a mining royalty under a written agreement for a lease, of which he had taken an assignment. One of the stipulations of the agreement was that *H.* (the person with whom the agreement was originally made) should not assign without the licence of the lessors. They were ready to consent to the assignment to *F.* provided he would execute a duplicate of the agreement containing this stipulation. Though repeatedly communicated with on the subject he delayed doing so. He entered into a contract with *B.* to sell his interest in the royalty, it was afterwards found that the lessors absolutely refused their assent to the transfer, and *F.* was unable to perform his contract with *B.* In an action by *B.* against *F.* for its non-performance:—*Held*, that *B.* could only recover the expenses he had incurred, but not damages beyond them.—*Flureau* v. *Thornhill* (2 W. Bl. 1078) adopted and

REAL ESTATE—*continued.*

affirmed.—*Hopkins* v. *Grazebrook* (6 B. & C. 31) overruled.—*Per* Lord *Chelmsford:* The rule laid down in *Flureau* v. *Thornhill* as to the limits within which damages may be recovered upon the breach of a contract for the sale of real estate, must be taken to be without exception. If a person enters into a contract for the sale of real estate, knowing that he has no title to it, nor any means of acquiring it, the purchaser cannot, in an action for breach of the contract, recover damages beyond the expenses he has incurred. Any other damages must be the subject of an action for deceit.—*Per* Lord *Hatherley:* A contract for the sale of real estate is very different from a contract for the sale of a chattel. In the former the purchaser knows that there must, with all the complications of our law, be an uncertainty as to making out a good title; in the latter the vendor must know what his right to the chattel is. Bain *v.* Fothergill - - - - 158

REAL AND PERSONAL ESTATE: *See* Will. 6.

REGISTER ACTS (IRELAND).] Where the owner of an estate in *Ireland* had already created an equitable mortgage upon it by depositing the title deeds with a creditor (which equitable mortgage was not registered); and, afterwards, on being asked for them by a solicitor who was about to prepare for another creditor a legal mortgage of the same estate, gave an excuse for their non-production, which, under the circumstances, appeared quite satisfactory, and also supplied in his own handwriting a summary statement of their contents; and the solicitor, in total ignorance of the equitable mortgage, and of all that had been previously done, prepared the legal mortgage, which was duly registered:—*Held*, that the legal mortgage had priority over the equitable mortgage, and was not assailable on the ground that the solicitor had improperly acted in preparing it without insisting on the production of the deeds:—*Per* Lord *Selborne:* It is inconsistent with the policy of the Irish Registration Law to impose on a mortgagee, or purchaser, the duty of inquiry with a view to the discovery of previous unregistered interests, but quite consistent with it, if he knows of the existence of those interests, to estop him from contending that, as to him, they are void, merely because they are unregistered.—Observations on the form of a decree for taking the accounts in such a case. Agra Bank *v.* Barry - - - - - 135

REGISTRATION: *See* Bills of Sale Act.

REGISTRATION OF SHARES IN A RAILWAY COMPANY: *See* Banker. 1.

RESERVATION OF A CREDITOR'S RIGHT: *See* Bankers. 2.

RESIDUARY LEGATEE: *See* Election; Next of Kin; Will. 8.

A residuary legatee under a will has a clear and tangible interest in the residue, and may therefore be subject to the rule of election. Cooper *v.* Cooper - - - - 53

RESTITUTION IN BLOOD: *See* Peerage.

RESTRICTION: *See* Colliery Owner.

REVOCABLE AGREEMENT: *See* Railway. 6.

RIPARIAN OWNERS.] A company which purchases the land of a riparian owner stands in the same situation as he did with respect to the water rights connected with that land. A canal company was established by certain Acts of Parliament. The Acts gave the canal proprietors rights as to taking water from streams within the distance of 2000 yards, for the purpose of making and maintaining the canal. They purchased a mill on a stream, from which stream they had the right to take water. In this way they became riparian owners. As such they were entitled to the flow of water from brooks and streams running into that stream, subject only to the rights which other riparian owners at the upper part of the stream might lawfully exercise.—The directors of a waterworks company purchased a mill on the upper part of the same stream, and so became riparian owners as the owner of that mill had been. They not only used the water for the purposes and in the manner allowed by law to every riparian owner, but collected it into a permanent reservoir for the supply of an adjacent town, and claimed, as their legal right, such a user of it:—*Held*, that this use of the water by the directors of the waterworks company was not a reasonable use of the stream, such as could justifiably be made by an upper riparian owner, and that the canal proprietors, who were also riparian owners, whose flow of water was thereby affected, were entitled to come into equity, and obtain an injunction to restrain this use of the water.—The canal proprietors had previously sold some of the water to the inhabitants of the town and others;—*Per* Lord *Hatherley:* Though that might be in excess of the powers given the canal proprietors by their Acts, it formed no excuse for what had been since done by the waterworks company.—The rights of riparian owners on the upper and lower portions of a stream discussed and explained. Swindon Waterworks Company *v.* Wilts and Berks Canal Company - 697

SALE AND PURCHASE: *See* Real Estate.

"SERVICE": *See* Accommodation; Railway. 5.

A Railway Act fixed a maximum sum for conveyance of trucks, but contained this exception: "Except a reasonable sum for loading, covering, and unloading of goods, and delivery and collection, and any other services incidental to the business of a carrier, where such services, or any of them, are performed by the company." Taking the waggons of a colliery owner from his own sidings and attaching them to the trains, or returning them from the line of the railway to the owner's sidings:—*Held*, not to be a "service" within the meaning of the exception. Lancashire, &c., Railway Company *v.* Gidlow 517

At some of the stations the colliery owner had been allowed to leave his coals on the ground adjoining the lines:—*Held*, that this did not come within the description of a "service" contained in the exception. *Ib.*

SETTLEMENT: *See* Married Woman.

A case of election may arise where a lady marries while an infant, and after her marriage,

SETTLEMENT—*continued.*

and after she has become of age, joins in a settlement where property of her husband is settled by him, and property of her father is settled by him, and property in which her father has a life interest, and in which she has an absolute interest in reversion, are all settled together on the trusts of the marriage, and she becomes *discoverte* and then claims the reversionary property independently of the settlement.—In contemplation of an intended marriage between *H. J. C.* and Miss *S.* it was agreed that certain property belonging to the lady's father, and also property of her intended husband, and a sum of 80,000 Sicca rupees in which the lady's father and mother (by the settlement made on their marriage) had life interests, and which was to belong to her absolutely after their deaths, should be settled to the uses of the marriage. No ante-nuptial settlement was made. Miss *S.* was then under age. The marriage took place. After she attained her majority a post-nuptial settlement was executed. Her husband, herself, and her father, were parties to it. The husband and the father respectively brought property into the settlement in which the husband and wife were to take life interests, and the sicca rupees to which she was entitled, in reversion, for her separate use, were settled to the like trusts. The settlement stated that the lady had agreed that they should be so settled, and the husband covenanted to ratify her settlement of them, but there was no absolute covenant on her part to that effect. Before the reversion fell into possession the marriage was dissolved by the decree of the Divorce Court. When it did fall into possession the lady claimed the rupees as her absolute property, coming to her under her father and mother's marriage settlement:—*Held*, that as the post-nuptial settlement on her own marriage shewed that the rupees had formed part of the consideration for the settlement therein of the other property, from which she had derived benefit, she must elect to take under or against it.—A special order directing how the accounts under the election were to be taken. Codrington *v.* Codrington - - 854

SHARES: *See* Preference Shares.

SOLICITOR.] The non-production, in *Ireland*, of title deeds to the solicitor instructed to prepare a mortgage upon an estate there, will not of itself be deemed a proof that the solicitor has acted fraudulently, or even negligently, so as to affect the interests of his client. The construction to be put upon his conduct does not depend on an inflexible rule of law, but upon the circumstances of the case.—The doctrine of imputing in all cases the knowledge possessed by the solicitor to the client who employs him, considered.—*Wormald* v. *Maitland* (35 L. J. (Ch.) 69) questioned. Agra Bank *v.* Barry - - - - 135

STATION (RAILWAY) CALLING NAME OF: *See* Negligence. 2.

STATUTES:

22 & 23 Car. 2, c. 10 (*Statute of Distributions*). Cooper *v.* Cooper - - 53

29 Car. 2, c. 3 (*Statute of Frauds*). Lakeman *v.* Mountstephen - - 17

STATUTES—*continued.*

6 Anne, c. 2 (Ir.) (*Register Acts (Ireland)*). Agra Bank *v.* Barry - - 135

11 Geo. 4 & 1 Will. 4, c. 40. Williams *v.* Arkle - - - - - 606

1 Vict. c. 26 (*Wills*). Willock *v.* Noble 580

8 & 9 Vict. c. 18 (*Lands Clauses Consolidation Act*, 1845). Metropolitan Board of Works *v.* McCarthy - - 243

8 & 9 Vict. c. 20. North Eastern Railway Company *v.* Wanless - - 12

8 & 9 Vict. c. 20 (*Railways Clauses Act*). Llanelly Railway Company *v.* London and North Western Railway Company [550

11 & 12 Vict. c. 63. Lakeman *v.* Mountstephen - - - - 17

16 & 17 Vict. c. 51 (*Succession Duties Act*, 1853). Commissioners of Inland Revenue *v.* Harrison - - - 1

17 & 18 Vict. c. 36 (*Bills of Sale*). Meux *v.* Jacobs - - - - 481

20 & 21 Vict. c. 79 (Ir.). Hilliard *v.* Eiffe [39

22 & 23 Vict. c. 59 (*Railway Companies Arbitration*). Llanelly Railway Company *v.* London and North Western Railway Company - - - - 550

23 & 24 Vict. c. 145. Williams *v.* Arkle. [606

25 & 26 Vict. c. 89 (*Companies Act*, 1862). Ashbury Waggon Co. *v.* Riche - 653

28 & 29 Vict. c. cli. (*East London Railway Act*). East London Railway Company *v.* Whitechurch - - - 81

STATUTE OF DISTRIBUTIONS.] The rule of the *Statute of Distributions* which requires the conversion of an intestate's estate into money, is introduced simply for the benefit of creditors, and the facility of division among the next of kin. But, as regards the substantial title to property, the right of the next of kin (subject only to the claims of creditors) is complete.—A residuary legatee under a will has a clear and tangible interest in the residue, and the *Statute of Distributions* being nothing but a will made by the Legislature for an intestate, his next of kin stand, with regard to his personal estate, in the same condition as does a residuary legatee under a will:—Both may therefore be subject to the rule of election.—In these respects a creditor does not resemble either. Cooper *v.* Cooper - 53

STATUTE OF FRAUDS.] A board of health had been formed in a town. *L.* was its chairman. *M.*, a contractor, had, under the orders of the board, formed a main sewer in the town, and, under the orders of the board, had purchased pipes which would be required to be used in making the connecting drains between certain private houses and the main sewer. The board had, under the 11 & 12 Vict. c. 63, s. 69, given notice to the inhabitants of certain streets to make these connecting drains, the effect of the notice being that if the said inhabitants did not make those connecting drains the board might make them and charge the expenses on the defaulting inhabitants. The

STATUTE OF FRAUDS—*continued.*
notice was disregarded. No subsequent resolution was passed by the board. *M.* was about to take away his carts and working materials, when *L.* said to him, "What objection have you to making the connections?" to which *M.* answered, "None, if you or the board will order the work, or become responsible for the payment; and *L.* replied, "*M.*, go on and do the work, and I will see you paid." *M.* did the work, and, the board refusing to pay, sued *L.* for the amount:—*Held*, that the words of *L.* were properly left to the jury as evidence to sustain a claim against him personally, and that they did not constitute a promise to pay the debt of another, so as to come within the operation of the *Statute of Frauds*.—*Per* Lord *Selborne*: There can be no suretyship unless there be a principal debtor, existing at the time, or constituted by matters *ex post facto*. Lakeman *v.* Mountstephen - - 17

STOCK: *See* Will.

STOCK EXCHANGE.] A purchase or sale of shares made by one who is not a member of the *Stock Exchange*, and made through a broker who is a member of that body, will be treated as made subject to the rules of the *Stock Exchange*.—The rules of the *Stock Exchange* imply that the name of the person given as that of the ultimate purchaser of shares must be that of one able and willing to purchase; and they are not satisfied if the name given is that of a non-existent person, a lunatic, an infant, a married woman, or a person who has not given authority for the use of his name.—The contract of a jobber is to accept the shares, or to furnish the name of a person able and willing to accept them; and the time limited by the rules of the *Stock Exchange* for the approval or rejection of the name of the ultimate purchaser applies only to the responsibility, and not to the personal capacity and willingness of the person whose name is given.—If therefore the name given is that of one who had no legal capacity to accept the shares, though the time limited is allowed to go by without objection to him, the original contractor, the jobber, will remain liable.—*M.*, not a member of the *Stock Exchange*, directed his broker to sell certain shares of a company, and the broker sold them to a jobber, who, according to the known practice on the *Stock Exchange*, sold them again (and in a similar way they passed through several hands), and the jobber (without fraud) received from his purchaser, and passed on to *M.'s* broker the name (that of *L.*) as the name of an ultimate purchaser; *M.* executed a transfer to *L.*, and received payment for the shares; *L.* turned out to be a minor legally incapable of accepting the shares; *M.'s* name (though without his knowledge) remained on the registry of the company; *L.* did not pay the subsequent calls, and *M.* was required to pay them:—*Held*, that the jobber was liable to make good to *M.* the calls which he had been compelled to pay on *L.'s* default.—*Rennie* v. *Morris* (Law Rep. 13 Eq. 203) disapproved. Nickalls *v.* Merry - - - - - 530

SUCCESSION DUTIES ACT.] If a tenant for life, and his son, the first tenant in tail under a will or a previous settlement, re-settle the estate, and by such re-settlement an annuity, charged upon the estate, is given to the son during his father's life, and the father dies and the son succeeds to the estate on which the annuity is charged, there must be, in calculating the succession duty under the 38th section of the *Succession Duties Act*, an allowance made to the son in respect of the amount of the annuity.—Whether the re-settlement was made before or after the *Succession Duties Act* came into operation makes no difference.—The cases of *Lord Braybrooke* v. *The Attorney-General* (9 H. L. C. 150), and *The Attorney-General* v. *Floyer* (9 H. L. C. 477) followed, and, upon the points on which they were decided, declared to be undistinguishable. Commissioners of Inland Revenue *v.* Harrison [1

"SUPERFLUOUS LANDS": *See* Railway. 4.

SURETY: *See* Principal and Surety.

SURETYSHIP: *See* Statute of Frauds.

TALLOW MARKET: *See* Broker.

R., a merchant in *Liverpool*, gave orders to a tallow broker in *London* to buy certain quantities of tallow for him. The broker did not buy the specified quantities from any person, though he sent bought notes in the usual form, "Bought of *A.* on your account;" but both before and after the order he bought from various persons in his own name larger quantities of tallow, proposing to allot to *R.* the quantities *R.* had desired to be bought. On *R.'s* refusal to accept, he sold the tallow and brought an action for the difference.—*Held*, that though the evidence shewed such a mode of dealing to be the usage in the *London* tallow market, the action was not maintainable against a principal who did not appear to have had knowledge of its existence. Robinson *v.* Mollett - - - - - 802

TIME—GIVING TIME: *See* Bankers. 2.

TIME OF CONTINUANCE OF AGREEMENT: *See* Railway.

TIME OF SALE OF "SUPERFLUOUS LAND": *See* Private Acts of Parliament; Railway. 4.

TIME IN A CONTRACT: *See* Partnership.

TITLE DEEDS: *See* Register Acts (Ireland); Solicitor.

TROVER.] Any person who, however innocently, obtains possession of the goods of a person who has been fraudulently deprived of them, and disposes of them, whether for his own benefit or that of any other person, is guilty of a conversion.—Where, therefore, *B.* had fraudulently obtained cotton from *F.*, and *H.* (whose ordinary business was that of a cotton broker, and who was utterly ignorant of the fraud of *B.*), purchased it from *B.* in the belief and expectation that *M.*, one of his ordinary clients, would accept it, and *M.* did afterwards accept it, though *H.* only received from *M.* a broker's commission and not a trade profit on the sale:—*Held*, that in this instance *H.* had made himself a principal, and by transferring the cotton to *M.* had committed an act of conversion, which made him liable in trover to *F.*, the real owner of the cotton.—A finding of a jury may be explained by the particular facts of the case:

TROVER—*continued.*

thus, a finding that Defendants had bought goods, as agents, in the course of their business as brokers, may be explained by the evidence that they were in business as brokers, and were in the habit of making purchases without any definite instructions from principals, and intended to purchase these goods in that way. But where the facts of the particular case shewed that they had, at the time of the purchase, no instructions from principals to make a purchase, but made it believing that it would be acceptable to persons for whom they often acted as brokers, but who were not bound to adopt the purchase, and who, if there arose any difference as to terms, could not insist on the purchase, the persons thus ordinarily acting as brokers made themselves liable to be treated as principals, and to answer in trover to the real owners of the goods.—*Stephens* v. *Elwall* (4 M. & S. 259), and *Hardman* v. *Booth* (1 H. & C. 803), approved of and acted on. Hollins *v.* Fowler - - - - - - 757

TRUST AND TRUSTEE: *See* Certificates of Shares; Partnership; Will.

1. If a trust fund is in the Court of Chancery, that Court may proceed to administer it, even although a foreign sovereign may be interested in it, and may not think fit to come before the Court in a suit relating to it.—A writing opening a credit for a particular sum cannot, of itself, constitute an equitable assignment or specific appropriation of that sum so as to create a trust. It is a mere statement that the person writing it will act as paymaster to the person to whom it is written, up to a certain amount, on his performing the conditions set forth in it.—*L.* entered into a contract (dated the 30th of November, 1870) with the French Minister of War, represented by *J.*, his delegate at *London*, to supply 20,000,000 of ball-cartridges of a certain quality, the whole to be supplied by the 10th of January, 1871. Time was to be considered of the essence of the contract. *L.* desired some arrangements to be made as to payment. *M. & Co.*, who acted in *London* as financial agents for the French Government, wrote to *L.* a letter dated the 1st of December, 1870, in these terms:—"We are instructed by *J.* to advise you that a special credit for the sum of £40,000 has been opened with us in your favour, and that it will be paid to you rateably as the goods are delivered, upon receipt of certificate of reception issued by the French Ambassador or by *J.*" The goods were not delivered according to the contract:—*Held*, that this letter did not constitute Messrs. *M. & Co.* trustees for *L.* as to the sum named, nor constitute an equitable assignment as of a fund in their hands, and that consequently this was not a matter for the exercise of the jurisdiction of the Court of Chancery. Morgan *v.* Larivière 423

2. —— A testator had some freehold property: the will directed that all his real and personal estate should be vested in his trustees and executors, to convert it into personalty, and invest, &c. The executors and trustees built a villa on a part of the freehold, in the belief that they could thereby improve the value of the rest. They had no authority to do this, but as they had done it *bonâ fide*, they were allowed to take the freehold property to themselves, including its value in the general account. *Jones* v. *Foxall* (15 East, 318; 21 L. J. (Ch.) 725) commented on. Vyse *v.* Foster - - - - - - - 318

3. —— The question whether a person is to take as an executor or trustee only, or to have a beneficial interest under a will, is a question of intention to be ascertained from the words of the will itself.—Where there are trusts to be performed, though they do not exhaust the fund (and then there is a general gift of residue without any accompanying trust to the executor), they may be taken to explain special provisions in the will exempting the executor from expense and liability. Williams *v.* Arkle - - 606

VALUABLE CONSIDERATION: *See* Bankruptcy.

VERDICT: *See* Broker; New Trial. 1.

"VESTED": *See* Railway. 4.

WARRANT OF ATTORNEY: *See* Interest.

A warrant of attorney was given to secure payment of a sum of money. Its date was the 2nd day of May, 1864, and the defeazance was in these terms: —"The within written warrant of attorney is given for securing the payment of the sum of £1330, with interest thereon, at and after the rate of £5 per cent. per month, on the 2nd day of June next. Judgment to be entered up forthwith," &c.:—*Held*, that this was nothing more than an authority to enter up a judgment for these various sums, to be ascertained on the 2nd of June, 1864, after which time the holder would merely stand as a creditor for the sums so ascertained, and the statutable rate of interest thereon that might be allowed him by a jury or by the Court.—*Per* Lord *Chelmsford:* The defeazance of a warrant of attorney is not a contract, but merely a description of the object of the security, and of the means of enforcing payment. Cook *v.* Fowler - - 27

WATER: *See* Riparian Owners.

WILL: *See* Executor; Partnership; Probate; Trusts.

1. Evidence of the declarations of a testator as to whom he intended to benefit, or supposed he had benefited, can only be received where the description of the legatee, or of the thing bequeathed, is equally applicable, in all its parts, to two persons, or to two things. But evidence of the circumstances, the habits, and the state of his family at the time he made the will, is admissible, so as to put the Court in the position of the testator, in order to ascertain the bearing and application of the language which he uses, and whether there exists any person or thing to which the whole description given in the will can be, with sufficient certainty, applied. — *Forster Charter*, a Northumbrian farmer, made a will in 1859; it was drawn for him, at his request, by the vicar of the parish. The vicar knew, personally, nothing of the testator's family. The testator had had a son named *Forster Charter*, but this son died unmarried while yet under age. The second son, who thereupon became the elder surviving son, was named

William Forster Charter. In 1850 he left home and settled in business at a place about 100 miles distant. He was never known as *Forster Charter*, but was called *William* or *Willie*. In 1853 he went to *Australia*, but returned in 1856. He then resumed his former business at his previous residence, and visited his father only occasionally. It was doubtful whether they were or were not on good terms with each other. The younger surviving son was named *Charles Charter*. He always lived with his father, except for a very short period in 1859 or 1860, when he absented himself on account of a quarrel in the family. On his return he went on as before, assisting his father, the testator, in the farm business till the father died, which was in 1869. The testator had three daughters; two were married and living away. They were not mentioned in the will. The third was unmarried, and lived with her father. Her name was *Barbara*. She was mentioned in the will, but was erroneously called "*Barbara Forster*," though she had never been known by that double name. The testator's residence and farm were, in the will, left to "my son *Forster Charter*," who was made executor. This name and this description were twice repeated. The will went on to provide an annuity for the wife, to be paid "by my executor *Forster Charter*," as long as they should "reside together in the same house"; but "should they think proper to live separately" the "said *Forster Charter*" was to let her live rent free in a neighbouring cottage, and furnish her, in addition to the annuity, with necessary supplies; and in case of any dispute between them as to the supplies, the decision of *W. D.* (a near neighbour and one of the witnesses to the will) was to be final. There was a similar provision as to "*Barbara Forster.*" Probate was granted by the provincial registrar to the eldest surviving son, *William Forster Charter*. On a citation to recall probate, evidence was received, not only of the state, circumstances, and habits of the family, but of the declarations of the testator as to his intentions with regard to his property:—*Held*, that this latter evidence was inadmissible:—*Held*, by The Lord Chancellor (Lord *Cairns*) and Lord *Selborne*, that evidence as to the state, circumstances, and habits of the family was here admissible.—And (*diss.* Lord *Chelmsford* and Lord *Hatherley*), that the evidence of that kind here given had the effect of correcting what was thereby shewn to have been a mistake in the will, *i.e.*, the name of the executor as there written; that the description of what was to be done, of the circumstances under which it was to be done, and of the person who was to act in doing it, of the place where the directions of the will were to be carried into effect, and all the circumstances connected therewith, pointed plainly to *Charles*, who had always been, and then was, resident with his father, as the person intended to carry the provisions of the will into effect; and that a mistake having been made in the use of one Christian name, which the provisions in the will and the evidence, properly admissible, had corrected, the original probate had been rightfully recalled; and that *Charles Charter* was properly and completely shewn to be the person rightfully entitled to the

probate.—The difficulty having been created by the act of the testator himself, the costs of both parties were ordered to come out of the estate.—Charter *v.* Charter - - - - **364**

2. —— A bequest to *A.*, and if she shall die unmarried or without children, to *B.*, is an absolute gift to *A.*, defeasible by an executory gift over in the event of *A.* dying, at any time, unmarried or without children. This construction can only be affected by a context which renders a different meaning necessary.—A gift to *X.* for life with remainder to *A.*, and if *A.* dies unmarried or without children to *B.*, is an executory gift over, which will defeat the absolute interest of *A.* in the event of *A.* dying, at any time, unmarried or without children.—There is no rule of construction arising from possible delay in the vesting of a gift, which controls the natural meaning of the terms of the bequest.—There is no authority that the words introducing a gift over in the case of the "death unmarried or without children" of a previous taker, do not indicate, according to their natural meaning, death unmarried or without children at any time, or that the ordinary and literal meaning of the words used is to be departed from otherwise than in consequence of a context which renders a different meaning necessary or proper.—Gift of £1000 consols to *A.* for her life, after her death to her daughter *B.*, "if *B.* should die unmarried or without children the consols I here will to revert to *C.*" The will then appointed *D.* residuary legatee. Both *A.* and *C.* died in the lifetime of the testatrix. On her death *B.* entered into possession, and married, but after some years died without ever having a child:—*Held*, that on the death of *B.* without children the gift over to the residuary legatee took effect, and that it was not affected by the death of *C.* in the lifetime of the testatrix. The gift to *C.* failed by lapse, and the residuary legatee became entitled to take all that *C.*, if living at the death of the testatrix, could have taken.—The words "I here will to revert to *C.*" indicated a benefit intended for *C.* by means of an executory limitation over, after enjoyment by a previous taker, and not an alternate gift to take effect, if at all, before the period of enjoyment had commenced.—The classification of rules set forth in *Edwards* v. *Edwards* (15 Beav. 357; 21 L. J. (Ch.) 324) examined, and the fourth rule, as there stated, overruled.—*Per* Lord *Hatherley:* The fourth rule in *Edwards* v. *Edwards* would be better stated thus:—"The period to which the executory devise will be referred will be the period of the death of the first taker, unless there are directions in the will inconsistent with that supposition."—*Da Costa* v. *Keir* (3 Russ. 360), *Galland* v. *Leonard* (1 Sw. 161), and *Home* v. *Pillans* (2 My. & K. 15), discussed and explained. O'Mahoney *v.* Burdett - - - **388**

3. —— A will contained bequests to daughters, failing whom and their issue living at their deaths, to sons, failing whom and their issue living at their deaths, to "*Mary H.*, her executors, &c., and in case *Mary H.* shall depart this life without leaving any issue of her body living at the time of her decease" over:—*Held*, that the natural meaning of these words was, the dying of *Mary H.* without issue

living at the time of her death, at whatever time that death might happen; on that event happening the fund went over.—And that there was no technical rule of construction which prevented the words from being applied according to this their natural meaning. The rule of construction, known as the fourth rule, stated in *Edwards* v. *Edwards* (15 Beav. 357; 21 L. J. (Ch.) 324) overruled. Ingram *v.* Soutten - - - 408

4. —— The expression of an intention accompanying a bequest does not, necessarily, constitute a condition on which the bequest is to take effect, or be defeated. The testator may not do that which would fully effectuate his expressed intention, and yet the bequest may be valid.—A testator left certain specified personalty to his wife for life, and after her death provided as follows, "I give and bequeath the same, &c. unto *University College, London*, for the purpose of founding in it a new professorship in Archæology, for the regulation of which professorship I purpose preparing a code of rules and regulations, which I intend to authenticate under my hand." As soon as convenient after his decease, the fact of his bequest and a copy of the rules were to be communicated to the college, and the college was, within twelve months afterwards, to signify in writing by the president, &c., the acceptance of the said rules; and if the college should decline or refuse to accept the rules, or should not within twelve months signify acceptance thereof, the bequest of the stock and shares was to be wholly null and void, and the stock and shares were to sink into and form part of the residuary estate. The testator died without making any rules.—*Held*, that the will contained a valid bequest, which was not affected by the subsequent provisions nor by the non-acceptance of intended rules and regulations, the acceptance of which had, by the act of the testator himself, been rendered impossible. Yates *v.* University College, London - - 438

5. —— *Per* Lord *Hatherley:* Those who take a benefit under a will, and have been instrumental in preparing or obtaining it, have thrown upon them the onus of shewing the righteousness of the transaction.—There is no unyielding rule of law (especially where the ingredient of fraud enters into the case) that, when it has been proved that a testator, competent in mind, has had a will read over to him, and has thereupon executed it, all farther inquiry is shut out. Fulton *v.* Andrew - - - - - - 448

6. —— The word "children" in a will means *primâ facie* "legitimate children," as much so as if the word "legitimate" had been introduced before it.—Where, therefore, a person who had two illegitimate children by a certain woman, married her, and the day after his marriage made a will in which after leaving her his real and personal property for life, he said, "I leave her at liberty to direct the disposal of the property amongst *our children* by will at her death in such manner as she shall think fit, and should she make no will I desire that the property existing at her death shall be divided, as far as it may be practicable to do so, equally between *my children by her*:" and had not any child born after the date of the will; but lived for some time after making it, and always treated the two illegitimate children as his own children:—*Held*, that the real and personal estate of the testator was, subject to the interest given to the widow for her life, undisposed of by the will.—The costs were ordered to be paid out of the estate. Dorin *v.* Dorin - - - 568

7. —— A married woman possesses under 1 Vict. c. 26, no greater or different power to make a will than she possessed before that statute. The 24th section of that statute does not, retroactively, operate to give effect to her will as to property which it was not in her power to dispose of at the time when the will was made.—Without the husband's knowledge of the contents of a will made by a married woman, the will cannot be said to be made with his assent.—If a married woman, with her husband's assent, makes a will of personalty, in which she has an expectant interest, but that interest does not actually vest in her until after her husband's death, she must, to give validity to her will, re-execute it after his death.—So also if her will affects property which (by his will made some years before and never altered) he had bequeathed to her absolutely.—*Morwan* v. *Thompson* (3 Hag. Ec. Rep. 239) questioned.—A married woman was entitled to a sum of £3000 for her separate use; the income of a sum of £14,000 was settled upon her husband and herself for life, subject, as to the sum itself, to her appointment, if she should die before him. He had a large property of his own. In 1857 he made his will, by which he left all his property to his wife and made her sole executrix. He never altered that will. He assented to her making a will during the coverture, and, in July, 1869, she made it in a form which affected to deal with all the three sorts of property; but there was no proof that he actually knew or had assented to its contents. He died in November, 1869. She, after his death, declared to her solicitor her adherence to her will, but she did not re-execute it. She died in January, 1870:—*Held*, that her will only disposed of the property which belonged to her for her separate use; that as to the £14,000, her power of disposition had not arisen; that as to the property bequeathed by her husband, she had no power of disposition till after his death, and that her will could have no operation on that property, as it was made before her title to that property existed; that neither his assent, nor her subsequent declaration of adherence, had given validity to her will; and that in order to be valid and effectual it ought to have been duly re-executed after his death, as an original will is required to be executed under the statute. Willock *v.* Noble - - - - - - 580

8. —— The question whether a person is to take as an executor or trustee only, or to have a beneficial interest under a will, is a question of intention, to be ascertained from the words of the will itself.—Where there are trusts to be performed, though they do not exhaust the fund (and then there is a general gift of residue, without any accompanying trust, to the executor), they may be taken to explain special provisions

WILL—*continued.*

in the will exempting the executor from expense and liability.—A testator had a sister, a wife, and two (illegitimate) children. By his will he appointed *G. A.*, if *G. A.* should survive him, his executor and trustee, but if *G. A.* should die in his lifetime he appointed *B. A.* He then gave "the following legacies": £1000 each to *G. A.* and *B. A.*; £2000 to a great nephew; £100 to his wife, and £100 apiece to his two children. After the gift of other legacies, he gave annuities to his wife and to his two children subject to restrictions as to anticipation, and an annuity to his sister *M. W.* He then gave his freehold and leasehold property (specially described), "and all other my real estate and the residue of my personal estate" (subject to two debts due to his sister) "unto the said *G. A.* for all my estate and interest therein respectively if he shall be alive at my decease, but if he shall die in my lifetime, then I give my said real estate and residuary personal estate unto *B. A.* for all my estate and interest therein respectively." He empowered his trustee to retain or change his investments, to be free from all responsibility on that account, to employ accountants and receivers, to be the guardian of his children during their minority, and he directed that the trustee should possess all powers granted to trustees by the 23 & 24 Vict. c. 145.—*Held* (*diss.* Lord *Chelmsford*), that the gift of the real and of the residue of the personal estate (the former unaccompanied by any trust) was not affected by the other provisions of the will, and that *G. A.* took them beneficially.—*Love* v. *Gaze* (8 Beav. 472) and *Saltmarsh* v. *Barrett* (29 Beav. 474; 3 De G. F. & J. 279) commented on.—The intention of the statute 11 Geo. 4 & 1 Will. 4, c. 40, explained. Williams *v.* Arkle **606**

9. —— The only son of a marriage cannot succeed to an estate which had been limited to *A.* and his heirs in tail male, "except an eldest son," and does not come in under a proviso giving the estate to *A.* and "all and every other the son of the body of *A.*, save and except an eldest son."—"Eldest" and "first-born" to be treated as synonymous terms.—*H. T.*, who was possessed of an estate called *S.*, married, in 1792, *Elizabeth C.*, who was possessed of an estate called *B.* They had three children, *H. M. T.*, *G. G. T.*, and *Melesina T.* On the marriage of *H. M. T.* in 1826 the estate of *S.* was settled on *H. T.* and *Elizabeth* (father and mother) for life, with an annuity to *H. M. T.*, and on the death of the father and mother the estate of *S.* was to go to *H. M. T.* for life, and then to his sons in tail male, in default, &c. to *G. G. T.* and his sons in tail male. On the marriage of *G. G. T.* in 1834 the estate of *B.* was settled on *H. T.* (the father) for life, then on *Elizabeth* his wife, then on *G. G. T.* for life, then to his sons in tail male, and in default, &c., to *Melesina* for life, then to the use of *H. M. T.*, then to the use of the second son of *H. M. T.* and his heirs male, and in default, to the use of the third, fourth, fifth, and of "all and every other the son of the body of *H. M. T.*, save and except an eldest son, severally, successively, and in remainder one after another," &c., "the elder of such son and sons, other than an eldest son as aforesaid, to be preferred," &c., "and in default or failure, &c., to

WILL—*continued.*

the use of *Henry Arabin*, his heirs and assigns for ever." And in case, under the deed of 1826, any person of the issue of *G. G. T.*, other and except a youngest or only son, or the heir male of his body, should become entitled to *S.* then the use of the estate of *B.* should thereupon cease, and the lands of *B.* should thereupon go over to the person next entitled. *H. M. T.* had only one son. *G. G. T.* had no issue. *Melesina* had been in possession of the estate *B.*, and was dead:—*Held*, that on her death the ultimate remainder in the estate of *B.* given to *Henry Arabin* took effect under the words which excluded an eldest son of *H. M. T.* holding *S.*, from succeeding to the possession of *B.*, and that an *only son* of *H. M. T.* had no title to *B.* and was not to be treated as other than an *eldest son* under the clauses which gave *B.* to the second, third, fourth, fifth, and all and every other son of *H. M. T.*, save and except an eldest son. Tuite *v.* Bermingham - **634**

10. —— The words "shares in a railway" company used in a will, are sufficient to pass "stock" in a railway company.—A testator bequeathed to his wife (besides other property) "leasehold estates and all such stocks in the public funds, or shares in any railway of which I may die possessed," and moneys and securities, for her life, then to his children if he should have any, and on her death and failure of issue he gave "the same leasehold estates, stocks, shares, moneys, and securities" unto his brother *T. B. A.* absolutely. The residue, consisting of carriages, furniture, moneys at his bankers, and rents then due to him, he gave to his wife absolutely, and made her his executrix; he died possessed of stock in the funds, of stock in a railway, and of shares in the same railway not fully paid up, and not converted into stock:—*Held*, that the words "shares in any railway" passed the testator's stock in that railway.—*Oakes* v. *Oakes* (9 Hare, 666) overruled.—*Trinder* v. *Trinder* (Law Rep. 1 Eq. 695) and *In re Gibson* (Law Rep. 2 Eq. 669) explained and applied. Morrice *v.* Aylmer - - - - - **717**

WITNESS.] No action will lie against a witness for what he says or writes when giving evidence before a Court of Justice. The rule is founded on principles of public policy. The same principle applies where a military man is bound to appear and give evidence before a military Court of Inquiry.—Where, therefore, a general in the army was called before a Court of Inquiry, assembled under the order of the General Commanding-in-Chief, to inquire into the conduct of a particular officer, made statements in evidence and, after the close of his evidence, handed in a written paper (not called for by the Court, but having reference to the subject of the inquiry) as to the conduct of that officer, and an action was brought in respect of those statements, which were alleged to be untrue and to be malicious:—*Held*, that evidence of their falsehood and malice was immaterial and irrelevant, and that, being statements made by a military man in the course of a military inquiry, in relation to the conduct of a military officer, and with reference to the subject of that inquiry, they were privileged.—A

WILL—*continued.*
military Court of Inquiry may not be strictly a judicial tribunal, but where such Court has been assembled under the orders of the General Commanding-in-Chief in conformity with the Queen's Regulations for the government of the army, a witness who gives evidence thereat stands in the same situation as a witness giving evidence before a judicial tribunal. Dawkins *v.* Lord Rokeby [744

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